Supreme Court, U.S.
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No. 98-

In the Supreme Court of the United States

OCTOBER TERM, 1998

ALLIANZ LIFE INSURANCE COMPANY
OF NORTH AMERICA,

Petitioner,

v.

DEBRA BARTGIS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Supreme Court of Nevada struck down a $7,500,000 "punitive damages assessment" against petitioner as excessive under state law and substituted in its place punitive damages of $3,750,000 — still more than 428 times respondent's economic loss ($8,758) in this insurance coverage dispute and more than 13 times her total compensatory damages ($284,000). The court evaluated the excessiveness of the punitive award "solely as a matter of state law" and, because it had made an adjustment to meet state law requirements, expressly refused to "consider Allianz's * * * argument, premised on *BMW of North America, Inc.* v. *Gore*, * * * that the punitive damages awarded in this case are grossly excessive pursuant to the Fourteenth Amendment of the Federal Constitution."

The following question is presented:

Whether a state court may refuse to consider a federal constitutional challenge to a punitive damages award on the ground that it has set an amount of damages that is not excessive under state law.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, Albert H. Wohlers and Co. was an appellant/cross-respondent in the Supreme Court of Nevada.

Petitioner Allianz Life Insurance Company of North America ("Allianz"), formerly known as North American Life Insurance Company, states that it is the wholly owned subsidiary of Allianz of America, Inc., which is, in turn, owned by Allianz Aktiengesellschaft. Allianz has one non-wholly owned subsidiary, AllMark, LLC.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Allianz Life Insurance Company of North America ("Allianz"), formerly known as North American Life and Casualty Company, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Nevada in this case.

The Nevada Supreme Court allowed punitive damages of $3.75 million against Allianz on the basis of a jury verdict for respondent Debra Bartgis finding that Allianz had fraudulently and in bad faith failed to pay approximately $8,000 in medical insurance benefits. Allianz specifically argued that such a multi-million-dollar punishment would violate the Due Process Clause of the United States Constitution, as recently explicated by this Court in *BMW of North Am., Inc.* v. *Gore*, 517 U.S. 559 (1996). The Nevada Supreme Court expressly refused, however, to consider Allianz's federal constitutional arguments. It did not suggest that the constitutional claim was not duly preserved or properly presented, but nevertheless held that it would decide the punitive damages issue "solely as a matter of state law." App., *infra*, 24a n.7. The court continued (*ibid.*):

> Thus, we do not consider Allianz's * * * argument, premised on *BMW of North America, Inc.* v. *Gore*, * * * that the punitive damages awarded in this case are grossly excessive pursuant to the Fourteenth Amendment of the Federal Constitution.

The federal constitutional error in this action is manifest. The "[e]lementary notions of fairness enshrined" in the Due Process Clause, which proscribe "grossly excessive" punitive damages awards, *BMW*, 517 U.S. at 568-575, may not be shrugged aside in deference to any state-law interests, policies, or requirements. That the Supremacy Clause, U.S. Const., art. VI, cl.2, forbids such a result has been one of the cornerstones of our constitutional system. See *Claflin* v. *Houseman*, 3 Otto (93 U.S.) 130, 136-142 (1876); see also *Testa* v. *Katt*, 330 U.S. 386, 390-391 (1947) (unanimous

Court in *Claflin* "repudiated the assumption that federal laws can be considered by the states as though they were laws emanating from a foreign sovereign. Its teaching is that the Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people"). Thus, whether in state or federal court, "the constitution is to be considered * * * as a paramount law." *Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137, 178 (1803).

Because the constitutional error in the opinion below is clear and on a long-settled issue, a summary reversal may be appropriate under Rule 16.1. See *Schweiker* v. *Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting) (summary reversal appropriate where "the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error"); see generally Stern, Gressman, Shapiro & Geller, SUPREME COURT PRACTICE 246-256 (1993).

Whether or not full plenary review is granted, the action of the Nevada Supreme Court should not be countenanced by this Court. First, such overt flouting of the Supremacy Clause is not something to be easily tolerated; the state courts should not be left with any doubt regarding their obligation to decide properly presented *BMW* excessiveness claims. Second, the failure to consider the due process issue was not harmless — it led directly to a grossly excessive $3.75 million punishment that is impossible to sustain under the *BMW* excessiveness analysis. Third, this error is not an isolated one; other state courts have erroneously deferred to state law and failed to apply the due process standards articulated in *BMW* to punitive damages verdicts.

OPINIONS BELOW

The opinion of the Supreme Court of Nevada (App., *infra*, 1a-30a) is reported at 969 P.2d 949. The order of the Second Judicial District Court for Washoe County denying petitioner's post-trial motions for judgment notwithstanding

the verdict, for a new trial, and for a remittitur (App., *infra*, 31a-49a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Nevada was entered on December 9, 1998. A timely petition for rehearing was denied on March 17, 1999 (App., *infra*, 50a-51a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, art. VI, cl. 2, provides in relevant part: "This Constitution * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT

A. Bartgis' Claim For Health Insurance Benefits From Allianz

Debra Bartgis is a court reporter in Reno, Nevada, and a member of the National Shorthand Reporters Association ("NSRA"). App., *infra*, 3a. She was covered under a group medical insurance policy issued to eligible members of NSRA by the Mutual Life Insurance Company of New York ("MONY"). *Id.* at 3a-4a. The MONY policy was administered by Albert H. Wohlers and Co. ("Wohlers"). *Ibid.*

In September 1990, MONY informed Wohlers that it was incurring unacceptable losses and would cease providing coverage as of February 15, 1991. MONY further stated that

in the interim, beginning on November 15, 1990, it would increase its premium for the NSRA policy by 55%. App., *infra*, 4a-5a. Consequently, NSRA directed Wohlers to find a replacement for MONY that would provide coverage without any increase over existing premiums, and to do so before the MONY premium increase became effective. *Ibid.* Wohlers contacted several major providers of medical insurance but had difficulty finding one willing to issue a policy that did not exclude preexisting conditions and that would entail no premium increase. *Id.* at 4a-5a; 10 ROA 539.[1]

Among the insurers Wohlers approached was petitioner Allianz, with which Wohlers had a longstanding business relationship; but, initially, Allianz likewise refused. App., *infra*, 4a. In November 1990, however, after repeated importuning by Wohlers, Allianz agreed to issue a policy that covered all NSRA members who were then insured under the MONY policy without excluding preexisting conditions and without an immediate increase in the premium. *Id.* at 4a-5a. Allianz agreed to do so, however, only on the condition that "significant internal cost limitations" would be incorporated into the policy. *Id.* at 4a.

Among the internal cost limitations ultimately chosen was a limit on the payments that would be made for so-called "ancillary charges," a term defined as "a service or supply that is furnished by a Hospital or Extended Care Facility when a Member or Insured Dependent is Confined." App., *infra*, 4a. The maximum benefit for ancillary charges was set at "the Daily Room Rate [multiplied by] the number of days of confinement [multiplied by] 2." *Id.* at 4a-5a.

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[1] "ROA" refers to the record on appeal in the Supreme Court of Nevada, and is preceded by the volume number and followed by the page number.

Wohlers notified NSRA members (including Debra Bartgis) in a November 15, 1990 letter that, because MONY "planned to raise its premiums by an unacceptable fifty-five percent," Allianz would replace MONY as the underwriter of the group's medical insurance policy. App., *infra*, 5a. The Wohlers letter stated that Allianz had agreed to "continue th[e MONY] coverage offering comparable benefits without an increase in premiums." *Ibid.* The letter urged NSRA members to read the enclosed outline comparing coverages under the MONY policy and the proposed Allianz policy. *Ibid.* Neither the Wohlers letter nor the outline of the coverages mentioned any maximum benefits limitation on ancillary charges or any other supply or service. *Ibid.*[2]

Bartgis read the November 1990 letter from Wohlers and elected coverage under the proposed Allianz policy. App., *infra*, 6a; 9 ROA 110-112, 135-137. In January 1991, Wohlers sent a second letter to each NSRA member who had elected coverage, including Bartgis. This letter referred to and included a copy of the insurance certificate. The letter from Wohlers again did not mention the maximum benefits limitation on ancillary charges or describe any other particulars of the coverage, although it did mention a new utilization review requirement. App., *infra*, 6a. The insurance certificate prepared by Allianz did, however, explain the ancillary charges limitation in detail. *Ibid.*

Bartgis was hospitalized in December 1992 for a hysterectomy. App., *infra*, 7a. She was confined in the hospital for 27 hours for the procedure, which was successful. *Ibid.*; 9 ROA 17, 23-24. Several weeks after her release, Bartgis

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[2] There was evidence that Allianz and Wohlers had not yet determined what specific internal benefits limitations would be utilized to control Allianz's costs and make it possible to offer coverage without any immediate premium increase. 10 ROA 454-456; 11 ROA 866-872.

received from Wohlers a written explanation of benefits, which detailed the amounts Allianz would pay for her surgery and hospitalization. App., *infra*, 7a-8a; 9 ROA 128-129. Under the policy, Allianz paid for the surgery itself and for Bartgis' room and board; but the notice stated that all of the hospital's other charges fell within the category of "ancillary charges" that were subject to the benefits limitation explained in the insurance certificate (*i.e.*, twice the daily room rate). App., *infra*, 7a. As a result of application of the ancillary charges limitation, more than $8,000 in expenses, covering such items as the operating room, the recovery room, and supplies that would have been covered under the prior MONY policy, were not paid by Allianz. *Id.* at 7a-8a.

B. The Institution and Trial of the Lawsuit

Upon receipt of Wohlers' explanation of her benefits, Bartgis "became extremely upset and frustrated." App., *infra*, 8a. In July 1993, after Wohlers had refused to reconsider the handling of her claim, Bartgis filed suit in Nevada state court against Wohlers and Allianz "alleging breach of contract, fraud, bad faith, and violations of the Nevada Unfair Claims Practices Act." *Id.* at 9a. She sought both compensatory damages for her economic loss and emotional distress and punitive damages. *Ibid.*[3]

Bartgis' case was not the only one challenging the ancillary charges limitation. Before Bartgis filed her suit, a plaintiff in Texas had sued Allianz. In September 1993, the Texas trial court entered summary judgment for Allianz, which the Texas Court of Appeals subsequently affirmed.

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[3] Bartgis had not appealed to Allianz from Wohlers' benefit determination, and the first Allianz learned of Bartgis' claim was when it was served with the lawsuit. 10 ROA 809, 832-833. It then promptly offered to pay the full claim without regard to the ancillary charges limitation, together with interest and attorney's fees, but the offer was refused. *Id.* at 833

Fisher v. *North Am. Life & Casualty Co.*, No. 05-93-01723-CV (Jan. 31, 1995). The *Fisher* court found that the language of the Allianz policy setting forth the ancillary charges limitation was unambiguous and that the maximum benefit provided under the policy for hospital services and supplies (other than room and board) was measured by the formula set forth in the insurance certificate for ancillary charges.

Despite the decision in *Fisher*,[4] and the plain language in Bartgis' insurance certificate limiting the maximum benefits for ancillary charges, App., *infra*, 4a-5a, the trial court denied Allianz's motion for summary judgment. At the trial on Bartgis' claims, she testified that, although she had read all of the materials sent to her by Wohlers, including her insurance certificate, she was unaware of the ancillary charges limitation, *id.* at 6a-7a, and was extremely upset when she learned that Allianz would not pay more than $8,000 in hospital and medical charges that she had assumed were covered under her policy, *id* at 8a.

The jury returned a verdict against Allianz and Wohlers on all of Bartgis' claims, awarding her $8,757.75 in contract damages and $275,000 in emotional distress damages, and finding both defendants liable for punitive damages. App., *infra*, 9a. At a second phase of the trial, the jury assessed punitive damages in the amount of $7.5 million against Allianz and $500,000 against Wohlers. *Ibid.*

The trial court denied the post-trial motions of Allianz and Wohlers for judgment notwithstanding the verdict or a new trial. App., *infra*, 40a-46a. In connection with these motions, the defendants argued specifically to the trial court, *inter alia*, that the punitive damages verdicts were impermis-

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[4] The Nevada trial court refused to allow the defendants to introduce evidence of this decision during the liability phase of the trial. 9 ROA 13-15.

sibly excessive under the Due Process Clause of the U.S. Constitution. Allianz and Wohlers appealed. *Id.* at 9a.

C. The Decision of the Nevada Supreme Court

The Supreme Court of Nevada affirmed the defendants' liability for fraud and bad faith. App., *infra*, 10a-16a. The court reversed the jury's verdict against Wohlers under the Nevada Unfair Claims Practices Act, but affirmed the verdict against Allianz under the same statute. *Id.* at 19a-23a. The court also affirmed the defendants' liability for punitive damages. *Id.* at 24a.

Allianz and Wohlers also challenged the size of both the compensatory and the punitive damages awarded to Bartgis. The Nevada Supreme Court affirmed the $275,000 awarded to the plaintiff as compensation for her emotional distress. App., *infra*, 16a-17a. It found, however, that the punitive damages awarded by the jury were "excessive as a matter of state law." *Id.* at 24a.

In reaching this conclusion, the court relied principally on the limited "degree of reprehensibility of Allianz's and Wohlers' conduct" (App., *infra*, 25a-26a):

> * * * Evidence presented at trial indicated that Allianz attempted to settle the case by offering to pay the full amount of Bartgis' claim and all of her attorney's fees after learning of her dispute over the ancillary charges limitation provision. Additionally, Allianz and Wohlers presented evidence indicating that of the small percentage of claimants who were affected by the ancillary charges limitation provision, numerous claims were resolved in favor of the policyholders at the completion of Allianz's internal appeals process.

The court also considered Wohlers' limited finances — the $500,000 awarded by the jury was over 20% of the company's net worth. *Id.* at 26a. Although the punitive award against Allianz was a much smaller percentage of its net

worth (less than 3%), the court "conclude[d] that Allianz's conduct in this case does not justify a punitive damages assessment that is approximately thirty times greater than Bartgis' award of $275,000.00 in compensatory damages." *Ibid.*

Based entirely on this analysis, and without further elaboration, the Nevada Supreme Court decided that "the jury's punitive damage assessment against Allianz is reduced from $7,500,000.00 to $3,750,000.00, and the punitive damage assessment against Wohlers is reduced from $500,000.00 to $150,000.00." App., *infra*, 27a.[5] The court did not explain its methodology in calculating the punitive damages it imposed.

The court expressly refused to consider Allianz's extensive arguments that a multi-million-dollar punishment in this case was grossly excessive in violation of the Due Process Clause. It held "that the jury's assessment of punitive damages is excessive solely as a matter of state law." App., *infra*, 24a n.7. The court did "not consider Allianz's * * * argument, premised on *BMW of North America, Inc.* v. *Gore*, * * * that the punitive damages awarded in this case are grossly excessive pursuant to the Fourteenth Amendment of the Federal Constitution." *Ibid.*

Allianz petitioned for rehearing, arguing that under the federal Constitution the Nevada Supreme Court must consider whether the $3.75 million in punitive damages awarded to Bartgis was excessive in violation of the Due Process Clause. Allianz specifically noted that the Supremacy Clause would not permit the state court to avoid application of the federal constitutional standards. The rehearing petition was denied without explanation. App., *infra*, 50a.

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[5] Wohlers intends to pay the judgment against it and is not seeking review by this Court.

REASONS FOR GRANTING THE PETITION

1. It was a fundamental constitutional error for the Supreme Court of Nevada to refuse to consider whether the $3.75 million punishment imposed on Allianz in this case, even if consistent with state law, violated federal due process protections against excessive punishment. The error was so basic, and on such a long-settled issue of constitutional law, that plenary review should not be necessary. See S. Ct. Rule 16.1. But the Nevada Supreme Court's refusal to consider the federal claim should not be overlooked by this Court on the basis that the applicable law is settled, because that refusal squarely implicates the Court's responsibility to oversee the due administration of federal law when state courts prove recalcitrant in meeting their constitutional obligations, and because the court below has repeated a mistake that a number of other state supreme courts have made in the three years since *BMW* was decided.

The judgment of the Nevada Supreme Court cannot be defended on any grounds. First, there was no valid procedural reason for the state court to refuse to apply the Due Process Clause in this case. The federal constitutional issue was "brought to the attention of the state court with fair precision and in due time." *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928).[6] Indeed, the court

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[6] Allianz filed post-trial motions that included general challenges to the verdict as excessive, and specifically invoked the federal Constitution for the first time in its reply brief in the trial court. Bartgis argued in the state courts that the federal claim was waived because not expressly raised on the first possible occasion, and she may repeat that contention here. The contention is, however, frivolous. There is nothing in the Nevada statutes, rules, or cases that suggests that raising the federal law aspects of the excessiveness issue in the trial court reply brief would be untimely, and neither the trial court nor the state supreme court suggested that

(continued...)

below never suggested that Allianz had failed to raise its due process challenge properly; rather, it is clear from its discussion that its only reason for declining to reach the federal claim was that it had already granted enough relief to satisfy state substantive law. App., *infra*, 24a.[7]

The Supremacy Clause of the U.S. Constitution, however, will not permit a state court to avoid application of federal constitutional standards by relying solely on state law. The Constitution is "the fundamental and paramount law of

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[6] (...continued)
there was any waiver of the federal claim. Under these circumstances, there is no tenable basis for finding that the refusal to decide the federal claim rested on a state-law procedural default. See *Michigan* v. *Long*, 463 U.S. 1032, 1040-1041 (1983); *Harris* v. *Reed*, 489 U.S. 255, 261-262 (1989).

Moreover, any holding that the federal claim was waived in these circumstances would not constitute an "adequate" state ground because it would unfairly and unnecessarily restrict the assertion of the federal right. At the time the trial court ruled, it had the federal claim before it, and Allianz was not on notice by rule or otherwise that the federal claim would be forfeited if not presented in the opening brief. *Henry* v. *Mississippi*, 379 U.S. 443, 447-449 (1965).

[7] Here, state excessiveness law does not provide an adequate and independent basis for sustaining the judgment. The "adequate and independent" state ground doctrine, as applied to substantive state law grounds such as that relied on below, divests this Court of jurisdiction only "where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, * * * [and] the non-federal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210 (1935). Here, the judgment rests "solely" on a state law ground that is manifestly *inadequate* because a resolution of the federal issue in Allianz's favor would require an alteration of the judgment.

the nation." *Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137, 177; see *Cooper* v. *Aaron*, 358 U.S. 1, 18 (1958) ("Article VI of the Constitution makes the Constitution the 'supreme Law of the Land'").[8]

The principle relied on by the Nevada Supreme Court cannot be sound: every case coming from a state court presumptively reflects a correct application of state law, so that this principle would render the federal Constitution generally inapplicable to state cases. In fact, of course, the "federal excessiveness inquiry" mandated by the Due Process Clause applies whether or not a lower court conducts a state-law excessiveness inquiry. *BMW*, 517 U.S. at 567-575.

In *BMW* itself — which is in this respect strikingly like the instant case — the Alabama Supreme Court applied state law to cut the punitive damages in half, from $4 million to $2 million. 517 U.S. at 567. This Court nonetheless held that the Due Process Clause required a *further* reduction in the punitive damages, based on three "guideposts" that inform the federal constitutional inquiry: the degree of reprehensibility of the defendant's conduct, the ratio of the punitive damages to the harm inflicted on the plaintiff, and the civil and criminal sanctions for comparable misconduct. *Id.* at 575-584. The Nevada Supreme Court, no less than the Alabama Supreme Court, is obligated to conform its judgment to the requirements of the Fourteenth Amendment when those requirements are duly invoked by a party before it.

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[8] See also *Howlett* v. *Rose*, 496 U.S. 356, 367 (1990) ("Federal law is enforceable in state courts * * * because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature"); *Hauenstein* v. *Lynham*, 10 Otto (100 U.S.) 483, 490 (1879) ("the Constitution * * * [is] as much a part of the law of every State as its own local laws and Constitution. This is a fundamental principle in our system of complex national polity").

2. The Nevada Supreme Court's refusal to consider the *BMW* guideposts severely prejudiced Allianz, for it is evident that a $3.75 million sanction in this case cannot survive federal constitutional scrutiny.

First, as the Nevada Supreme Court itself determined in finding that the jury's original $7.5 million verdict was excessive, Allianz's conduct was not highly reprehensible. App., *infra*, 26a. The record reveals two companies (Wohlers and Allianz) struggling under tight time deadlines to maintain insurance coverage for NSRA members in a very difficult insurance market (see *id.* at 4a-5a). There may well have been carelessness or deceptiveness in the statements made by Wohlers to NSRA members in seeking to sign them up for the new Allianz policy — and the jury obviously found punishable conduct by both of the defendants. But the magnitude of the punishment cannot possibly be justified on the ground that the conduct in question was highly reprehensible. This is emphatically so in the case of Allianz, whose liability is essentially vicarious.[9]

Second, the Nevada Supreme Court relieved itself of the obligation to heed this Court's admonition that punitive damages should bear a reasonable relationship to the actual harm (*i.e.*, compensatory damages) caused by the conduct being punished. The *BMW* Court observed that the "principle that exemplary damages must bear a 'reasonable relationship'

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[9] Virtually all the acts that Bartgis condemns are acts of Wohlers, from the drafting of the correspondence to the handling of her claim. While it is true that someone at Allianz saw the November 1990 letter to NSRA members before it was sent, it is far from clear that there was anything more heinous on the part of Allianz than a failure to appreciate the letter's potential to mislead. And as soon as Allianz itself actually became aware of Bartgis' dissatisfaction with the handling of her claim, it offered to pay all of her ancillary charges together with her attorneys' fees (10 ROA 833; App., *infra*, 9a, 25a-26a).

to compensatory damages has a long pedigree," 517 U.S. at 580, and noted that "a punitive damages award of 'more than 4 times the amount of compensatory damages' might be 'close to the line'" ordinarily marking the outer limit of allowable punishment (*id.* at 581, quoting *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 23-24 (1990) (punitive damages of approximately $840,000 "close to the line" of unconstitutionality when viewed in relation to plaintiff's compensatory damages of about $200,000)).

The Nevada Supreme Court's choice of a punishment more than 13 times the plaintiff's total compensatory damages constitutes an extraordinarily severe outcome that cannot be squared with the requirement that there be some reasonable relationship to actual or threatened damages.

Third, contrary to this Court's decision in *BMW*, the Nevada Supreme Court did not "[c]ompar[e] the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct." 517 U.S. at 583-584. Had it done so, as Allianz urged, the state court would have seen that the statutory penalties available in Nevada for most types of insurance violations, including fraud, generally range from $1,000 up to a maximum of $10,000. See, *e.g.*, NRS § 679B.185(1) (maximum $10,000 fine for "unauthorized transaction of insurance"); NRS § 680A.200(1) (maximum $2,000 fine for violating or failing to comply with order of insurance commission or willfully violating insurance regulations); NRS § 686A.290(2) (maximum $5,000 fine for knowing or willful false statement in application for insurance); NRS § 616B.318(1) (maximum $1,000 fine for violations by self-insurer).

These penalty levels reflect the public policy of Nevada, with its recognition that deterrence of misconduct should be proportionate, that penalty levels in the tens of thousands of dollars, not millions, are appropriate, and that excessive penalties can hurt the state's insurance market. The state

court's decision here is far outside of the range of civil penalties deemed appropriate in Nevada for insurance company misconduct.

Nor could the third prong of the *BMW* analysis be satisfied by reference to the Nevada statute (NRS § 42.005(1)) that generally limits punitive damages to three times the plaintiff's compensatory damages, including in cases of fraud, but exempts insurance bad faith from the cap. To avoid application of the statutory cap, the court characterized the defendants' fraud — failing "to inform Bartgis of the significant reduction in coverage" in her new insurance policy and misrepresenting to her "that coverage under the [new] polic[y] was comparable" to her former policy (App., *infra*, 14a) — as also constituting bad faith.

This holding is unprecedented under Nevada law where, as here, the text of an insurance policy plainly limited the coverage sought by a plaintiff. To the contrary, the court had previously ruled that "the concepts of 'bad faith' and 'fraud' are separate and distinct, requiring the allegation and proof of different elements," *Land Resources Dev.* v. *Kaiser Aetna*, 100 Nev. 29, 32, 676 P.2d 235, 237-238 (1984).[10] Accord-

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[10] The Nevada Supreme Court's precedents provided that bad faith "is established where the insurer acts unreasonably and with knowledge that there is no reasonable basis for its conduct." *Guaranty Nat'l Ins. Co.* v. *Potter*, 112 Nev. 199, 206, 912 P.2d 267, 272 (1996); see also *Falline* v. *GNLV Corp.*, 107 Nev. 1004, 1009, 823 P.2d 888, 891 (1991) ("[b]ad faith" is "'the absence of a reasonable basis for denying benefits * * * and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim'"). Thus, if the text of an insurance policy provided a reasonable basis for denying or limiting a claim, then under these precedents no bad faith liability could attach. In this case, Allianz contended, and the court below found, that the ancillary charges provision in Bartgis' policy excluded coverage for

(continued...)

ingly, although the defendants could be liable for fraud in failing to disclose or misrepresenting the coverage limitation, they could not, under longstanding Nevada precedents, be liable for bad faith in applying that limitation.

The point here is emphatically not simply that the court below made an error of state law, for it is manifestly within the Nevada Supreme Court's authority to change the definition of the conduct that constitutes the tort of insurance bad faith. The point is that it violates "fundamental notions of fairness enshrined in our constitutional jurisprudence" to punish a party for bad faith without "fair notice" in advance

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[10] (...continued)
such charges to the extent they exceeded the number of days of hospital confinement times twice the "Daily Room Rate." App., *infra*, 4a-5a.

Fraud, on the other hand, includes the following elements: (1) a false or misleading statement or omission; (2) made by the defendant with an intent to deceive the plaintiff; (3) on which the plaintiff reasonably relies; (4) and suffers damage as a result. See *Bulbman, Inc.* v. *Nevada Bell*, 108 Nev. 105, 111, 825 P.2d 588, 592 (1992); App., *infra*, 15a. In this case, the jury determined that "Allianz had deliberately misrepresented the policy and had concealed the ancillary charges limitation in order to induce Bartgis' enrollment in the policy," and the Nevada Supreme Court upheld that finding. *Id.* at 15a-16a.

Thus, the distinction under Nevada law has always been that misrepresentations or wrongful omissions in the inducement to purchase an insurance policy are classified as fraud, while bad faith ordinarily entails the unreasonable or oppressive handling of claims. The Nevada Supreme Court has *never* previously held that a defendant could be liable for bad faith for failing to pay a claim that the insurance policy itself did not cover. Neither Bartgis nor the court below has cited any case for the proposition that fraud in the inducement to purchase a policy could simultaneously constitute bad faith, and we know of none.

of its conduct that its actions could be treated as constituting bad faith. *BMW,* 517 U.S. at 574. Because Allianz lacked notice that its agent's statements regarding the scope of coverage could constitute bad faith, it cannot be punished on that basis and the exclusion of bad faith cases from Nevada's statutory cap on punitive damages may not be used to show notice of the possibility of a seven figure punishment in this case.

In sum, the Nevada Supreme Court's constitutional error in refusing to apply *BMW*'s due process standards was significant. It led the court to impose an unconstitutionally excessive punitive exaction, which it will almost certainly have to reduce if it is required to reconcile its judgment with Allianz's federal due process rights.

3. Significantly, the refusal of the Nevada Supreme Court to consider Allianz's federal constitutional challenge to the punitive damages in this case is not an isolated occurrence. Other state supreme courts in post-*BMW* cases have reached the same conclusion, finding it is sufficient to review punitive damages for excessiveness under state law, and have accordingly failed or refused to conduct *any* federal due process review of whether punitive awards were excessive under the *BMW* guideposts. Yet this Court's decisions in *Honda Motor Co.* v. *Oberg*, 512 U.S. 415 (1994), and *BMW* plainly require *some* review of punitive damages awards under the federal due process standard.

A glaring example is *State Farm Mut. Auto. Ins. Co.* v. *Grimes,* 722 So.2d 637 (Miss. 1998). In that case, the Mississippi Supreme Court affirmed a jury verdict awarding $1,900 in compensatory damages and $1,250,000 in punitive damages against the defendant in an insurance bad faith case. In its decision, the court in *Grimes* held that the punitive award survived review under Mississippi law without considering the defendant's arguments that the punitive damages

verdict was nonetheless excessive under federal due process standards. 722 So.2d at 640-642.

This was no mere oversight, for the dissenters expressly criticized the failure to apply this Court's *BMW* analysis, stating that the defendant's excessiveness arguments under the Fourteenth Amendment's Due Process Clause "should have been considered by this Court" and, indeed, that those arguments were in fact meritorious. *Id.* at 646-648.

The New Mexico Supreme Court likewise has failed to apply the *BMW* guideposts when doing so would likely have resulted in a significant reduction of a punitive award. See *Coates* v. *Wal-Mart Stores, Inc.*, 1999 WL 159810 (N.M. Feb. 22, 1999). In *Coates*, two former employees sued Wal-Mart for alleged sexual harassment by their former supervisor. The jury awarded one employee $114,000 in compensatory damages ($30,000 of which was for intentional infliction of emotional distress, the sole basis on which punitive liability was predicated) and $1,200,000 in punitive damages; the other employee was awarded $63,000 in compensatory damages ($15,000 on the intentional infliction claim) and $555,000 in punitive damages. 1999 WL 159810 at *3.

The court in *Coates* affirmed the punitive damages verdicts after reviewing their excessiveness under only the state-law standard. 1999 WL 159810 at *11. That standard required merely that the jury's punitive damages award not be shown to have been the product of "manifest passion and prejudice rather than reason or justice." *Id.* (internal quotation marks and citation omitted). The *Coates* court made no effort, however, to apply the *BMW* guideposts or to conduct any federal due process review of the punitive damages.

* * * * *

In the final analysis, the constitutional error in this case is flagrant, highly prejudicial, and not an isolated occurrence. The due exercise of this Court's supervisory responsibilities

demand that a prompt halt be put to this improper practice before it spreads further.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1999

APPENDICES

APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF NEVADA

ALBERT H. WOHLERS AND CO. AND NORTH AMERICAN LIFE AND CASUALTY COMPANY,
APPELLANTS/CROSS-RESPONDENTS,

vs.

DEBRA BARTGIS, RESPONDENT/CROSS-APPELLANT.

NO. 28142

DECEMBER 9, 1998

AMENDED FEBRUARY 19, 1999

Appeal and cross-appeal from a judgment awarding compensatory and punitive damages. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

Affirmed in part, reversed in part and remanded; punitive damage award modified.

Lemons, Grundy and Eisenberg, Reno,
for Appellant/Cross-Respondent Wohlers.

Beckley, Singleton, Jemison & List and Daniel F. Polsenberg, Las Vegas; Mayer, Brown & Platt and Andrew L. Frey and John J. Sullivan, Washington, D.C.,
for Appellant/Cross-Respondent North American Life and Casualty Company.

Calvin R.X. Dunlap, Reno,
for Respondent/Cross-Appellant.

Georgeson, Thompson & Angaran, Reno,
for Amicus Curiae American Council of Life Insurance.

Bradley, Drendel & Jeanney, Reno,
for Amicus Curiae Nevada Trial Lawyers.

Bowman & Robinson, Reno,
for Amicus Curiae Association of Trial Lawyers of America.

OPINION

PER CURIAM:

This is a case involving fraud, bad faith, and violations of the Nevada Unfair Claims Practices Act by a medical insurance company and its policy administrator. Respondent/cross-appellant Debra Bartgis (Bartgis) is a court reporter who filed a medical insurance claim subsequent to having surgery. Prior to the surgery, the underwriter for her major medical policy had changed. The new underwriter became appellant/cross-respondent North American Life and Casualty, now known as Allianz Life Insurance Company of North America (Allianz).

The administrator of the policy, appellant Albert H. Wohlers & Co. (Wohlers), had notified Bartgis of the change and sent her a copy of the new insurance certificate. However, Bartgis was unaware that a new internal cost limitation in her policy effectively limited her in-patient hospitalization coverage to room and board in the event that her hospitalization exceeded twenty-four hours. When the new internal cost limitation provision was triggered, all hospital charges beyond room and board were considered "ancillary" and were covered at a substantially reduced rate.

After her surgery, Bartgis filed a claim with Allianz pursuant to her major medical policy. However, Wohlers informed Bartgis that her Allianz policy would cover only ten percent of her total hospital bill of approximately $9500.00 because her hospitalization had exceeded twenty-four hours. After Allianz's repeated refusals to pay additional amounts pursuant to her policy, Bartgis filed a civil complaint against Allianz and Wohlers, alleging breach of contract, fraud, bad faith, and violations of the Nevada Unfair Claims Practices Act.

At the conclusion of trial, the jury returned a verdict in favor of Bartgis on all claims, awarding her $8,757.75 in contract damages and $275,000.00 in non-economic compensatory damages for emotional distress. One day later, the jury assessed punitive damages against Allianz and Wohlers in the amounts of $7,500,000.00 and $500,000.00, respectively. Judgment was entered on May 19, 1995.

Allianz and Wohlers now appeal, and Bartgis cross-appeals. For the reasons set forth below, we affirm the jury's verdict in most respects. We conclude, however, that the district court erred in entering judgment against Wohlers based on the Unfair Claims Practices Act. Additionally, we hold that the punitive damages assessed against Allianz and Wohlers were excessive, and that the district court erred in denying Bartgis post-judgment interest on the punitive damages awards.

FACTS

Bartgis is a court reporter who has been a member of the National Shorthand Reporters Association (NSRA) since 1973. She worked as an employee of a Nevada court-reporting business from 1973 to 1983, and then formed a partnership with a colleague. After forming the partnership, Bartgis obtained a medical insurance policy through NSRA. The medical insurance policies offered by NSRA to its

members were underwritten by Mutual of New York (MONY), and were administered by Wohlers.

On September 24, 1990, MONY informed Wohlers by letter that it planned to increase the cost of premiums by fifty-five percent effective November 15, 1990. Wohlers contacted several other major medical insurance underwriters in an attempt to secure a medical insurance policy for NSRA before MONY's premium hike went into effect. One of the underwriters Wohlers contacted was Allianz, with whom Wohlers had enjoyed a long-term business relationship.

After initially refusing Wohlers's proposal, Allianz agreed to underwrite the policy at the same monthly premium, but with additional significant internal cost limitations. The agreement between Allianz and Wohlers provided Wohlers with substantial administrative and claims management responsibilities. For example, the agreement provided that Wohlers would administer the policy, share in a percentage of the premiums paid, and share in Allianz's profits that were realized from Wohlers's efforts to keep claim costs down. Thus, Wohlers had a direct pecuniary interest in minimizing claim costs.

During their November 1990 negotiations, Wohlers and Allianz agreed to insert a new cost limitation on ancillary charges into the NSRA policy. Significantly, this "ancillary charges" cost limitation provision had not been included as a provision in NSRA's prior policy with MONY. Allianz's policy with NSRA defined the term "ancillary charges" as "a service or supply that is furnished by a Hospital or Extended Care Facility when a Member or Insured Dependent is Confined."

The maximum benefit for ancillary charges under the Allianz policy applied to a patient's confinement in a hospital and was computed as "the Daily Room Rate

[multiplied by] the number of days of confinement [multiplied by] 2." Hospital confinement, for purposes of the Allianz policy, was defined as "confinement as a Registered Bed-Patient in a Hospital upon the advice of a Physician for a period of twenty-four (24) hours or longer and such confinement is for purposes other than convalescence or rehabilitation."

In November 1990, Wohlers informed Bartgis by letter that Allianz would now serve as her medical insurance policy underwriter because MONY had planned to raise its premiums by an unacceptable fifty-five percent. In its letter, Wohlers stated that Allianz had agreed to "continue this coverage offering comparable benefits without an increase in premiums," effective November 15, 1990. The letter specified that premiums were guaranteed until February 15, 1991, and assured plan participants that the "new NSRA plan [had] been carefully designed to [provide] the needed health care insurance protection at an affordable price."

Wohlers concluded its letter by encouraging all plan participants to compare the prior MONY policy benefits and coverage with those of the new Allianz policy. The policy outlines included information about deductibles and maximum coverage under the old MONY policy and the new Allianz policy. Under the new policy, Allianz would pay eighty percent of Bartgis' allowable hospital expenses up to $5,000.00. After expenses reached that amount, Allianz would pay one hundred percent. Significantly, the policy outlines did not notify plan participants of the new "ancillary charges" cost limitation provision that had been inserted into the Allianz policy, nor did the comparison outlines mention the provision or explain its intended effect. The letter was signed by Wohlers's executive vice-president James R. Malik.

Bartgis read both the letter and policy outlines in order to determine what changes had been made to her coverage. After comparing the details on the outlines, she concluded that the Allianz policy provided better coverage than her previous MONY policy. Bartgis did not read anything indicating limitations on ancillary charges.

On December 11, 1990, Allianz and Wohlers reviewed and accepted a final draft of the policy that contained the ancillary charges limitation provision. In January 1991, Wohlers sent a second letter to all NSRA members explaining the change of underwriters and providing policyholders with an insurance certificate. Bartgis read the letter, which again made no mention of the new ancillary charges limitation provision. Although the new ancillary charges limitation provision was noted in the policy certificate, there was no accompanying explanation that this provision represented a significant deviation in benefits when compared to NSRA's previous policy with MONY.

In 1991, Bartgis was diagnosed with pre-cancerous cells in her reproductive organs. On April 15, 1991, she underwent a cone biopsy, and the treating physicians removed the diseased cells. Following the half-day procedure, which was performed in a hospital, Bartgis filed a claim pursuant to her Allianz medical insurance policy. In accordance with the policy provisions outlined in the November 1990 letter from Wohlers, Allianz paid eighty percent of the medical bill, and Bartgis paid twenty percent.

Four weeks later, Bartgis experienced a medical emergency that required her to be taken to the emergency room of a local hospital. Bartgis again properly filed another claim with Allianz, and Allianz paid fifty percent of the bill, which was the coverage percentage for emergency room visits outlined in the November 1990 letter.

Bartgis' discomfort grew steadily, as did her consumption of estrogen and prescription medications in an effort to manage her pain and avoid surgery. Finally, after being told she could no longer take the hormone pills, Bartgis decided, per the recommendation of her physician, to undergo a total hysterectomy. She then perused the Allianz policy in order to determine the applicable coverage rate for the procedure. Her policy listed the procedure as an "elective" procedure, which meant that she would have to pay an additional $200.00 toward her deductible. Bartgis followed the pre-certification procedures required under the policy and obtained certification for a twenty-four hour stay. Based on her understanding of the policy, Bartgis believed that she would only incur an additional $500.00 charge in the event that her hospitalization exceeded twenty-four hours.

The surgery was performed on December 29, 1992. As before, Bartgis assumed that Allianz would pay eighty percent of her medical expenses up to $5,000.00, and one hundred percent thereafter. Although Bartgis had only obtained certification for a twenty-four hour stay, she was hospitalized for approximately twenty-seven hours, including check-in and check-out time.

On Saturday, January 23, 1993, Bartgis received an explanation of covered expenses from Wohlers. Several of the itemized charges were covered by Allianz at the percentages and rates outlined in the November 1990 letter from Wohlers. However, the majority of the bill — $9328.75 — was listed under a lump-sum charge of which Allianz covered only $930.00. The corresponding explanation code on the document identified the $9,328.75 as "ancillary charges." The detailed listing of charges from the hospital also revealed that Allianz had deemed all medical expenses beyond basic room and board as "ancillary charges."

Thus, Allianz categorized the expenses for Bartgis' operating room ($2,708.98), recovery room ($390.60), sutures and staples ($2,286.63), heart monitor ($103.80), anesthesia and anesthesia system ($401.70), and numerous other charges, as "ancillary" for coverage purposes. Accordingly, Allianz agreed to cover only ten percent of these "ancillary" medical expenses.

Upon receipt of the letter, Bartgis became extremely upset and frustrated. On Monday, January 25, 1993, Bartgis contacted Wohlers for an explanation as to why Allianz would only cover ten percent of the major medical expenses listed on her hospital bill. Delores Pricener, a Wohlers representative, explained that because Bartgis' hospitalization had exceeded twenty-four hours, Bartgis was classified as an in-patient and that such classification triggered the ancillary charges limitation provision in her policy. Pricener explained that when the ancillary charges limitation was in effect, essentially all charges from the hospital except for basic room and board were subject to the ancillary charges limitation provision contained in Bartgis' policy.

Bartgis then sought the assistance of her friend and attorney, Margaret Manes. Manes reviewed the policy and also concluded that Wohlers had erred. Manes called Pricener, who provided Manes with the same explanation for denying the claim that she had given to Bartgis. When Manes requested to speak to a supervisor, Manes was required to fax a letter of legal representation before anyone would speak with her. Manes faxed a letter of representation to Pricener at Wohlers's office.

Subsequently, Manes received a letter from Wohlers explaining that because Bartgis' stay in the hospital had exceeded twenty-four hours, the ancillary charges limitation provision in Bartgis' policy had been triggered. Distraught, Bartgis attempted to obtain a major medical insurance plan

through another carrier but was unsuccessful because of her pre-existing medical condition. Throughout this period, Bartgis became further upset, losing sleep and her appetite. During the following three months, she developed two bladder infections and an upper-respiratory infection, suffered dramatic weight loss, and felt "generally terrible."

On July 15, 1993, Bartgis filed a civil complaint against Allianz and Wohlers alleging breach of contract, fraud, bad faith, and violations of the Nevada Unfair Claims Practices Act. Bartgis sought both compensatory and punitive damages. After Bartgis filed her complaint, Allianz offered to pay the entire amount in dispute from the hospital bill, plus attorney's fees, in return for Bartgis' relinquishment of her claims for fraud and bad faith. Bartgis refused.

At trial, the jury returned a verdict in favor of Bartgis and against Allianz and Wohlers on all claims: (1) $8,757.75 in contract damages; (2) $275,000.00 in non-economic compensatory damages for emotional distress; and (3) that both Allianz and Wohlers were subject to punitive damages.

Following the punitive damage phase of the trial, the jury assessed exemplary damages in the amounts of $500,000.00 and $7,500,000.00 against Wohlers and Allianz respectively. Judgment was entered on May 19, 1995. Wohlers and Allianz now appeal, and Bartgis cross-appeals with respect to the district court's failure to award post-judgment interest on the punitive damage awards.[1]

1/ We note that counsel for appellants herein did not represent appellants in the district court proceedings.

DISCUSSION

The jury's finding of bad faith is supported by substantial evidence.

Allianz first contends that there is insufficient evidence to support the jury's finding of bad faith because it had reasonable grounds upon which to deny making full payment on Bartgis' claim. Specifically, Allianz asserts that based on the language of the ancillary charges limitation provision, a genuine issue existed as to its obligation under Bartgis' policy which, in turn, obviates its bad faith liability for failure to pay Bartgis' claim.[2] We

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[2] Allianz and Wohlers make two other challenges to Bartgis' favorable bad faith verdict. First, they contend that the jury's bad faith and fraud verdicts are "fatally inconsistent" because if they had fraudulently misrepresented the amount of coverage under the policy by informing Bartgis that the policy afforded more coverage than in fact it did, then they could not be held liable for bad faith failure to pay a claim. Conversely, "if the policy did cover the full amount of plaintiff's claim, then nothing was concealed from [Bartgis] and there was no fraud or actionable nondisclosure." We reject this argument. It is preposterous to suggest that an insurer's fraudulent acts could, in turn, insulate it from bad faith liability and vice versa. Rather, from the evidence adduced at trial, the jury could have found that appellants'/cross-respondents' fraudulent actions constituted a breach of the duty of good faith and fair dealing, thereby exposing them to bad faith liability. Likewise, we see no inherent inconsistencies in the jury's verdict.

Secondly, Allianz and Wohlers assert that the district court's inability to find as a matter of law that Bartgis was entitled to full payment of her claim pursuant to her policy "demonstrates . . . the unsoundness of her bad faith claim." This argument is not persuasive. Initially, we note that Bartgis did not move the district court for either summary judgment or a directed verdict. More importantly, although we recognize that some jurisdictions have

(continued...)

disagree.

It is well settled in Nevada that "every contract imposes upon the contracting parties the duty of good faith and fair dealing." *Hilton Hotels Corp. v. Butch Lewis Productions, Inc.*, 109 Nev. 1043, 1046, 862 P.2d 1207, 1209 (1993). As we explained in *Ainsworth v. Combined Insurance Co.*, 104 Nev. 587, 592, 763 P.2d 673, 676 (1988), "[t]he relationship of an insured to an insurer is one of special confidence.[3] A consumer buys insurance for security, protection, and peace of mind." (footnote added). While an insured assumes various duties under an insurance contract — such as the timely payment of premiums — the insurer assumes the concomitant duty "to negotiate with its insureds in good faith and to deal with them fairly." *Id.*

"Bad faith is established where the insurer acts unreasonably and with knowledge that there is no reasonable basis for its conduct." *Guaranty Nat'l Ins. Co.*

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[2](...continued)
adopted the directed verdict rule, *see, e.g.*, *National Savings Life Insurance Co. v. Dutton*, 419 So.2d 1357, 1362 (Ala. 1982) (explaining that in order to establish a prima facie case of bad faith, the plaintiff must proffer sufficient evidence demonstrating that the plaintiff is entitled to a directed verdict on the contract claim), the rule adhered to by a vast majority of jurisdictions is that a plaintiff need not establish that it is entitled to a directed verdict on the contract claim in order to establish a prima facie bad faith claim. *See* William M. Shernoff et al., *Insurance Bad Faith Litigation* § 5.02[3], at 5-21 (1998). We believe that the majority rule represents the more reasoned approach and, thus, we decline to adopt the directed verdict rule.

[3] With regard to first party claims, we have determined this relationship to be "akin" but not ascending to a fiduciary relationship.

v. Potter, 112 Nev. 199, 206, 912 P.2d 267, 272 (1996). In reviewing a determination of bad faith, this court "will not disturb a trial court's findings of fact unless they are clearly erroneous and not based on substantial evidence." *Id.*

In *Sparks v. Republic National Life Insurance Co.*, 647 P.2d 1127, 1137 (Ariz. 1982), the Arizona Supreme Court faced a similar situation wherein the defendant insurance company asserted that the evidence was insufficient to support a finding of bad faith because its obligation under the insurance contract was "'fairly debatable.'" In *Sparks*, the insureds suffered catastrophic injuries in a small plane crash while their health insurance policy was in effect. *Id.* at 1131. Subsequently, after the insured's small business went bankrupt due to their debilitating injuries and inability to work, the insurer terminated their health insurance policy for underpayment and denied them any further medical benefits for injuries sustained while their policy had been in force. *Id.*

In rejecting the insurance company's argument that its obligation pursuant to the policy was debatable due to a certain policy provision, and in concluding that substantial evidence supported the giving of the bad faith instruction, the *Sparks* court held:

> We disagree with the [insurance company's] contention that an insurer's belief that a portion of its insurance contract precludes coverage raises an absolute defense to a claim of bad faith. If the insurer's interpretation of its own contract as excluding coverage could render an insured's claim "fairly debatable," then insurers would be encouraged to write ambiguous insurance contracts, secure in the knowledge that an obscure portion of the policy would provide an absolute defense to a claim of bad faith. Although the insurer's belief that the validity of the insured's claim was fairly

> debatable is a defense to a charge of bad faith, such a belief is a question of fact to be determined by the jury.

Id. at 1137.

In similar fashion, we reject Allianz's assertion that its interpretation of the ancillary charges limitation provision in Bartgis' policy provided reasonable grounds upon which to deny Bartgis' claim, thereby sheltering it from bad faith liability. To the contrary, substantial evidence was presented to the jury from which it could have concluded that Allianz and Wohlers had engaged in bad faith.

Specifically, the jury heard evidence of the November 1990 letter from Wohlers to Bartgis, which had been pre-approved by Allianz, that made no mention of the harsh ancillary charges limitation provision. Further, the evidence adduced at trial established that in the same letter, Allianz and Wohlers made the significant misrepresentation that the new Allianz policy contained comparable benefits with Bartgis' previous MONY policy, a policy which did not contain the ancillary charges limitation provision. Additionally, the jury heard evidence that the defendants continued to conceal the ancillary charges limitation provision in subsequent communications to Bartgis. Finally, the evidence presented at trial established that by way of Allianz's and Wohlers's tortured interpretation of the arcane ancillary charges limitation provision, Bartgis' policy — which Allianz and Wohlers had ostensibly represented as a comprehensive major medical insurance policy — covered only hospital room and board. By interpreting the policy in a manner that denied coverage for all medically necessary procedures and expenses such as the operating and recovery room expenses, anesthesia, all medications, sutures, and roughly ninety percent of Bartgis' hospital bill, Allianz and Wohlers deprived Bartgis of the peace of mind and security for which she had bargained.

Based on these facts, we conclude that Allianz's failure to inform Bartgis of the significant reduction in coverage, its representation that coverage under the two policies was comparable, its absurd interpretation of the ancillary charges limitation provision, and its denial of Bartgis' claim pursuant to that provision, were unreasonable. Accordingly, we conclude that the jury's finding of bad faith is supported by substantial evidence.

The jury's finding of fraud is supported by substantial evidence.

Allianz and Wohlers argue that Bartgis failed as a matter of law to prove the elements of her fraud claim. Specifically, Allianz contends that it never made or intended any misrepresentation, and that Bartgis failed to prove that she relied on any of Allianz's representations. We disagree.

As an initial matter, Allianz and Wohlers assert that the jury instruction defining clear and convincing evidence, upon which the jury predicated its finding of both fraud and punitive damages, was erroneous.[4] Specifically, they assert that the definition provided by the district court offered little guidance to the jury as to the meaning of the clear and convincing evidence standard. We disagree.

In *Addington v. Texas*, 441 U.S. 418, 432-33 (1979), the Supreme Court explained that in order to satisfy due process, instructions on the clear and convincing standard need only "inform the factfinder that the proof must be greater than the preponderance-of-the-evidence standard applicable to other categories of civil cases." Consistent with this teaching, in *Topaz Mutual Co. v. Marsh*, 108 Nev.

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[4] During trial, the district court instructed the jury that "[c]lear and convincing evidence is evidence which is beyond a mere preponderance of the evidence."

845, 850-51, 839 P.2d 606, 610 (1992), we concluded that the identical clear and convincing instruction at issue in the present case was sufficient to ameliorate an otherwise erroneous instruction that suggested that damages for fraud could be established by a preponderance of the evidence. Accordingly, we conclude that the clear and convincing evidence instruction used in this case was sufficient, and that the district court did not err in so instructing the jury.

Turning to the substance of Allianz's and Wohlers's fraud argument, we have previously held that fraud must be proven by clear and convincing evidence as to each of the following elements: (1) a false representation made by the defendant; (2) defendant's knowledge or belief that the representation is false (or insufficient basis for making the representation); (3) defendant's intention to induce the plaintiff to act or to refrain from acting in reliance upon the misrepresentation; (4) plaintiff's justifiable reliance upon the misrepresentation; and (5) damage to the plaintiff resulting from such reliance. *Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 111, 825 P.2d 588, 592 (1992).

Further, this court "will not overturn the jury's verdict if it is supported by substantial evidence, unless, from all the evidence presented, the verdict was clearly wrong." *Bally's Employees' Credit Union v. Wallen*, 105 Nev. 553, 555-56, 779 P.2d 956, 957 (1989). The reviewing court "must assume that the jury believed the evidence favorable to [the prevailing party] and made all reasonable inferences in [that party's] favor." *Id.*, 105 Nev. at 555, 779 P.2d at 957.

Here, by way of Wohlers's November 1990 and January 1991 letters to Bartgis, which concealed the ancillary charges limitation provision and which misrepresented the Allianz policy as being comparable to Bartgis' previous MONY policy, the jury could have concluded that Wohlers and Allianz had deliberately

misrepresented the policy and had concealed the ancillary charges limitation in order to induce Bartgis' enrollment in the policy.

In assuming that the jury believed the foregoing evidence in favor of Bartgis, and made all reasonable inferences from such evidence in her favor, we conclude that the jury could have found that Allianz and Wohlers were liable for fraud. Accordingly, we conclude that the jury's finding of fraud is supported by substantial evidence.

The compensatory damage award is not excessive.

At the conclusion of trial, the jury awarded Bartgis $275,000.00 in non-economic compensatory damages for emotional distress. On appeal, Allianz and Wohlers assert that the evidence presented at trial was insufficient to support the jury's finding that Bartgis suffered compensable emotional harm and that the jury's award was excessive. We disagree.

It is well established that this court "will affirm an award of compensatory damages unless the award is so excessive that it appears to have been 'given under the influence of passion or prejudice.'" *Guaranty Nat'l Ins. Co. v. Potter*, 112 Nev. 199, 206, 912 P.2d 267, 272 (1996) (quoting NRCP 59(a)(6)). "The size of the award alone is not conclusive evidence that it was the result of passion or prejudice." *Id.* at 207, 912 P.2d at 272. "Rather, 'the core of the matter seems to be that an appellate court will disallow or reduce the award if its judicial conscience is shocked.'" *Id.* (quoting *Miller v. Schnitzer*, 78 Nev. 301, 309, 371 P.2d 824, 829 (1962)).

Based on our review of the record on appeal, we conclude that the amount of Bartgis' compensatory damages award was not the product of passion or prejudice. Evidence presented during trial established that as a result of appellant's fraudulent misrepresentations, concealment,

and bad faith course of conduct, Bartgis was deprived of her peace of mind and sense of security during a post-operative and vulnerable juncture of her life. Throughout this period, evidence presented at trial indicated that Bartgis suffered numerous stress-related bladder infections, loss of appetite, and loss of sleep. Further, the jury heard evidence of Bartgis' dramatic weight loss of approximately seventeen pounds from the time that Wohlers denied her claim until the time of trial. Bartgis testified as to the nature of these ailments, along with her anxiety and financial hardship. Although Allianz offered to pay the disputed amount plus attorney's fees shortly after these proceedings were commenced, the award is still not so excessive or without basis as to require reduction or elimination on appeal.

The district court did not err in finding that Wohlers was contractually obligated on an insurance policy between Bartgis and Allianz.

The jury in this case found that Wohlers and/or Allianz had "breached its contractual obligations to [Bartgis]." Wohlers argues that because it was not a party to the insurance contract between Bartgis and Allianz, it could not be held liable for any policy-based contractual claims or bad faith claims emanating from a breach of the duty of good faith and fair dealing. In response, Bartgis asserts that as a full service administrator that shared in Allianz's profits, Wohlers was contractually obligated to her by way of the medical insurance policy. We agree.

In general, no one "is liable upon a contract except those who are parties to it." *County of Clark v. Bonanza No. 1*, 96 Nev. 643, 648-49, 615 P.2d 939, 943 (1980). However, according to a well-established exception to this general rule, where a claims administrator is engaged in a joint venture with an insurer, the administrator "may be held liable for its bad faith in handling the insured's

claim, even though the organization is not technically a party to the insurance policy." William M. Shernoff et al., *Insurance Bad Faith Litigation* § 2.03[1], at 2-10 (1998).

Pursuant to this generally recognized exception, in *Farr v. Transamerica Occidental Life Insurance Co.*, 699 P.2d 376, 386 (Ariz. Ct. App. 1984), the Arizona Court of Appeals concluded that an insurance administrator was sufficiently involved in a joint venture with the insurer to expose it to bad faith liability based on evidence that the administrator collected premiums, handled claims, and received a commission on collected premiums and a percentage of renewal commissions.

In the instant case, and in similar fashion, we conclude that the evidence sufficiently established that Wohlers and Allianz were involved in a joint venture to an extent sufficient to expose Wohlers to all policy-based contractual claims and bad faith liability. Here, the evidence proffered at trial indicated that Wohlers developed promotional material, issued policies, billed and collected premiums, paid and adjudicated claims, and assisted Allianz in the development of the ancillary charges limitation provision. Further, because Wohlers shared in Allianz's profits, it had a direct pecuniary interest in optimizing Allianz's financial condition by keeping claims costs down. Indeed, Wohlers's administrative responsibilities and its special relationship with Allianz are more indicative of the existence of a joint venture than the situation presented in *Farr*.

Due to the extent of Wohlers's administrative responsibilities, policy management duties, and special relationship with Allianz, we conclude that Wohlers and Allianz were involved in a joint venture to an extent sufficient to expose Wohlers to liability on all contract-based and bad faith claims.

The district court erred in finding that Wohlers was liable under NRS 686A.310.

Wohlers asserts that it is not an insurer within the meaning of the applicable statutory definition and, thus, it cannot be held liable for alleged unfair claims practices proscribed under NRS 686A.310 because the statute applies only to insurance companies. We agree.

We have previously held that in determining what the legislature intended, the title of a statute may be considered in construing the statute. *A Minor v. Clark Co. Juvenile Ct. Servs.*, 87 Nev. 544, 548, 490 P.2d 1248, 1250 (1971). The title of NRS 686A.310 reads "Unfair practices in settling claims; *liability of insurer* for damages." (Emphasis added). From a plain reading of its title, there is no indication that the legislature intended NRS 686A.310 to apply to other entities beyond insurers.

At trial, Bartgis relied on NRS 686A.520 for the assertion that Wohlers was an "insurer" for purposes of NRS 686A.310. NRS 686A.520 provides, in relevant part:

> 1. The provisions of . . . NRS 686A.010 to 686A.310, inclusive, apply to companies.
>
> 2. For the purposes of subsection 1, *unless the context requires that a section apply only to insurers*, any reference in those sections to "insurer" must be replaced by a reference to "company."

(Emphasis added). The term "company" is defined as a person engaged in the business of entering into "agreements." NRS 686A.330 (2). The term "agreement" is defined as a contract under which a person agrees to pay an insurance premium in advance, on behalf of the insured or the prospective insured, in exchange for some consideration such as repayment with interest. NRS 686A.330. After a thorough review of the record, we

conclude that no evidence exists that indicates Wohlers financed or paid premiums on behalf of Bartgis.

Further, despite the fact that the title of NRS 686A.310 clearly states that the following provisions apply to the liability of insurers, the district court instructed the jury that NRS 686A.310 applied to "one or both defendants." Based on the foregoing reasoning, we conclude that NRS 686A.310 does not apply to Wohlers because it is not an insurer or company within the meaning of the applicable statutory law. Therefore, the district court erred in applying the provisions of NRS 686A.310 to Wohlers.

In the alternative, Bartgis asserts that NRS 686A.020 brings Wohlers within the ambit of liability under NRS 686A.310. This argument is not persuasive. NRS 686A.020 provides, in relevant part, that:

> A person shall not engage in this state in any practice which is defined in NRS 686A.010 to 686A.310, inclusive, as, or determined pursuant to NRS 686A.170 to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.

Bartgis asserts that this section applies to Wohlers because Wohlers is a person within the meaning of the statute. Although "person" is not defined in this particular section, NRS 0.039 defines "person," in relevant part, as "a natural person, any form of business or social organization and any other nongovernmental legal entity including, but not limited to, a corporation, partnership, association, trust or unincorporated organization."

Admittedly, Wohlers comes within the NRS 0.039 definition of person. However, when considering unfair claims practices, the jury found Wohlers liable for violating NRS 686A.310, which expressly proscribes unfair practices in settling claims by an insurer, which Wohlers is not. We are not willing to expand the definition of "insurer" and

"company" beyond that which has been provided by the legislature and, thus, we reject Bartgis' assertions that Wohlers's actions constituted a violation of NRS 686A.310. Accordingly, we reverse the jury's determination that Wohlers was liable for violating NRS 686A.310.

Our reversal of Wohlers's NRS 686A.310 liability in no way compromises our affirmance of Wohlers's liability on all contract-based, fraud, and bad faith claims.[5] Notwithstanding our determination that Wohlers is not an insurer within the ambit of NRS 686A.310, Wohlers may still be held liable for all common law contract and bad faith claims and punitive damages. In general, the majority rule maintains that a defendant's liability or exoneration pursuant to an unfair claims statutory scheme "does not preclude a common-law tort cause of action for bad faith." William M. Shernoff et al., *Insurance Bad Faith Litigation* § 6.04[3], at 6-39 (1998). Recognizing the validity of the majority rule, Wohlers concedes that a reversal of its NRS 686A.310 liability would not, in turn, insulate it from punitive damages stemming from any of Bartgis' other claims. Accordingly, our reversal of Wohlers's NRS 686A.310 liability does not jeopardize our affirmance of the

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[5] Additionally, our reversal of Wohlers's NRS 686A.310 liability in no way necessitates a new trial with respect to any of Bartgis' remaining claims. While we acknowledge that when a jury returns a general verdict on multiple claims, and it is impossible to determine on which claims the jury predicated liability, an error on one or more of the claims necessitates a new trial. *See, e.g., Lightenburger v. Gordon*, 81 Nev. 553, 407 P.2d 728 (1965). Here, however, the jury's special verdict clearly indicates that the jury found Wohlers liable on all claims including contract, fraud, bad faith, and statutory unfair claims practices. Accordingly, our reversal of Wohlers's NRS 686A.310 liability does not alter the jury's finding of liability on Bartgis' remaining claims.

jury's finding of Wohlers's liability on all common law contract-based claims, fraud, and bad faith.

The district court did not err in finding that Allianz violated NRS 686A.310.

Allianz argues that Bartgis failed to set forth the essential elements necessary to show a violation of the Nevada Unfair Claims Practices Act. We disagree.

The district court instructed the jury regarding seven unfair practices set forth in NRS 686A.310.[6] At the

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[6] The list of unfair practices included:

1. Misrepresenting to insureds or claimants pertinent facts or insurance policy provisions relating to any coverage at issue;

2. Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under an insurance policy;

3. Failing to effectuate prompt, fair and equitable settlements of a claim in which liability of the insurer has become reasonably clear;

4. Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds, when the insureds have made claims for amounts reasonably similar to the amounts ultimately recovered;

5. Attempting to settle a claim by an insured for less than the amount to which a reasonable person would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application;

6. Failing to settle claims promptly, where liability has

(continued...)

conclusion of trial, the jury determined that Allianz and Wohlers had engaged in unfair claims practices.

Based on our review of the record, we conclude that the jury's verdict that Allianz engaged in one or more unfair claims practices is supported by substantial evidence. As previously indicated, the jury heard evidence indicating that in the Allianz-approved November 1990 and January 1991 letters to Bartgis, the Allianz policy was misrepresented as being "comparable" to Bartgis' previous MONY policy. Further, the evidence suggested that Allianz had unilaterally inserted the arcane ancillary charges limitation provision into Bartgis' policy and then failed to disclose this provision or explain its intended effect. Additionally, the jury heard evidence indicating that Allianz had acted unreasonably in denying her claim through its absurd interpretation of the ancillary charges limitation provision. The jury also heard evidence of Allianz's failure to offer Bartgis a reasonable explanation, on the basis of her policy, for the denial of her claim.

Based on these facts, we conclude that the jury's finding that Allianz violated provisions of NRS 686A.310 is supported by substantial evidence.

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[2](...continued)

become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage;

7. Failing to provide promptly to an insured a reasonable explanation of the basis in the insurance policy, with respect to the facts of the insureds' claim and the applicable law, for the denial of her claim or for an offer to settle or compromise her claim.

The punitive damages assessments are excessive as a matter of law.

At the conclusion of trial, the jury assessed $7,500,000.00 in punitive damages against Allianz and $500,000.00 against Wohlers. On appeal, Allianz and Wohlers argue that the jury's assessment of $8,000,000.00 in punitive damages was excessive. Although we conclude that substantial evidence exists to support the jury's finding of fraud and bad faith necessary to justify an assessment of punitive damages, the respective punitive damage amounts assessed against both Allianz and Wohlers are excessive as a matter of state law.[7]

NRS 42.005 provides that punitive damages may be awarded "in an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied." When a prevailing plaintiff's compensatory damages exceeds $100,000.00, punitive damages are capped by statute to three times the amount of the compensatory damages. *See* NRS 42.005(1)(a). When the plaintiff recovers less than $100,000.00 in compensatory damages, punitive damages must be limited to a maximum of $300,000.00. *See* NRS 42.005(1)(b). Significantly, the foregoing statutory caps on punitive damages do not apply to "[a]n insurer who acts in bad faith regarding its obligations to provide insurance coverage." NRS 42.005(2)(b).

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[7] We hold that the jury's assessment of punitive damages is excessive solely as a matter of state law. Thus, we do not consider Allianz's and Wohlers's argument, premised on *BMW of North America, Inc. v. Gore*, ___ U.S. ___, ___, 116 S. Ct. 1589 (1996), that the punitive damages awarded in this case are grossly excessive pursuant to the Fourteenth Amendment of the Federal Constitution.

In *Guaranty National Insurance Co. v. Potter*, 112 Nev. 199, 208, 912 P.2d 267, 273 (1996), we reiterated the following standard for reviewing the excessiveness of a punitive damages award:

> Punitive damages are legally excessive when the amount of damages awarded is *clearly* disproportionate to the degree of blameworthiness and harmfulness inherent in the oppressive, fraudulent or malicious misconduct of the tortfeasor under the circumstances of a given case. If the awarding jury or judge assesses more in punitive damages than is reasonably necessary and fairly deserved in order to punish the offender and deter others from similar conduct, then the award must be set aside as excessive.

(quoting *Ace Truck & Equipment Rentals, Inc. v. Kahn*, 103 Nev. 503, 509, 746 P.2d 132, 136-37 (1987)). In determining whether a punitive damages award is excessive pursuant to this standard, we will consider a variety of factors including "the financial position of the defendant, culpability and blameworthiness of the tortfeasor, vulnerability and injury suffered by the offended party, the extent to which the punished conduct offends the public's sense of justice and propriety, and the means which are judged necessary to deter future misconduct of this kind." *Id.* at 208, 912 P.2d at 273-74 (quoting *Ace Truck & Equipment Rentals, Inc. v. Kahn*, 103 Nev. 503, 510, 746 P.2d 132, 137 (1987)).

Based on the standard we reiterated in *Guaranty National Insurance Co.*, we conclude that the jury's respective punitive damage assessments against Allianz and Wohlers are excessive as a matter of law. From the facts of this case, we conclude that these awards are clearly disproportionate to the degree of reprehensibility of Allianz's and Wohlers's conduct. Evidence presented at trial indicated that Allianz attempted to settle the case by

offering to pay the full amount of Bartgis' claim and all of her attorney's fees after learning of her dispute over the ancillary charges limitation provision. Additionally, Allianz and Wohlers presented evidence indicating that of the small percentage of claimants who were affected by the ancillary charges limitation provision, numerous claims were resolved in favor of the policyholders at the completion of Allianz's internal appeals process.

Moreover, although the jury heard evidence attesting to Allianz's and Wohlers's fraudulent conduct and bad faith, the assessment against Wohlers is nearly twenty-one percent of that company's net worth.[8] While the facts of this case demonstrate that Wohlers engaged in fraudulent misrepresentation and bad faith conduct, we conclude that this assessment exceeds the deterrent effect intended by an award of punitive damages.

In similar fashion, the facts presented at trial demonstrated that Allianz had engaged in fraudulent misrepresentation and bad faith conduct. However, while the assessment against Allianz amounts to merely two and one-half percent of that company's $300,000,000.00 net worth, we conclude that Allianz's conduct in this case does not justify a punitive damage assessment that is approximately thirty times greater than Bartgis' award of $275,000.00 in compensatory damages.

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[8] During trial, the jury heard evidence indicating that Allianz's net worth was $300,000,000.00 and Wohlers's net worth was $2,435,000.00. Based on their respective net worth, the jury's assessment of $7,500,000.00 in punitive damages against Allianz amounted to approximately two and one-half percent of its net worth, and the $500,000.00 punitive damage assessment against Wohlers amounted to approximately twenty-one percent of its net worth.

Based on the foregoing, we conclude that the jury's punitive damage assessments against Allianz and Wohlers are excessive and disproportionate to their degree of blameworthiness. The respective punitive damage awards assessed by the jury in this case exceed the punishment and deterrent effect intended by an award of punitive damages. Accordingly, the jury's punitive damage assessment against Allianz is reduced from $7,500,000.00 to $3,750,000.00, and the punitive damage assessment against Wohlers is reduced from $500,000.00 to $150,000.00.

Bartgis is entitled to post-judgment interest on punitive damages.

In her cross-appeal, Bartgis argues that the district court erred in denying her motion for post-judgment interest on the punitive damage award pursuant to NRS 17.130.[9] We agree.

Although Allianz and Wohlers assert that Bartgis is not entitled to post-judgment interest on punitive damages pursuant to our decision in *Ainsworth v. Combined Ins. Co.*, 105 Nev. 237, 244, 774 P.2d 1003, 1009 (1989) (concluding that an award of post-judgment interest on punitive damages would not further the underlying purposes

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[9] In relevant part, NRS 17.130 provides:

> 1. In all judgments . . . rendered by any court of justice, for any debt, damages or costs . . . the amount must be computed, as near as may be, in dollars and cents . . . .
>
> 2. When no rate of interest is provided by contract or otherwise by law, or specified in the judgment, the judgment draws interest from the time of service of the summons and complaint until satisfied, except for any amount representing future damages, which draws interest only from the time of the entry of the judgment until satisfied . . . .

and policies of punitive damages), we have recently modified our *Ainsworth* decision.

In *Powers v. USAA*, 114 Nev. ___, ___ P.2d ___ (Adv. Op. No. 79, July 16, 1998), we held that NRS 17.130 allowed for post-judgment interest on punitive damages on the reasoning that such damages comprise part of a prevailing plaintiff's judgment as defined by NRS 17.130. *Id.* at 19-20. In concluding that NRS 17.130 allowed for post-judgment interest on punitive damages, and in modifying our *Ainsworth* decision, we explained that "[t]he purpose of post-judgment interest is to compensate the plaintiff for loss of the use of the money awarded in the judgment 'without regard to the elements of which that judgment is composed.'" *Id.* at 19 (quoting *Air Separation v. Lloyd's of London*, 45 F.3d 288, 290 (9th Cir.1973)).

Accordingly, pursuant to our decision in *Powers*, Bartgis is entitled to post-judgment interest on her punitive damage award.[10]

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[10] Although Bartgis purports to appeal from the district court's order denying her post-judgment motion for post-judgment interest on the punitive damages, we conclude that this order is not an appealable special order after final judgment. *See Wilkinson v. Wilkinson*, 73 Nev. 143, 145, 311 P.2d 735, 736 (1957) (explaining that "[t]he mere fact that the order in point of time is made after a final judgment has been entered does not render it appealable. It must affect the rights of the parties growing out of final judgment"). Nevertheless, we construe Bartgis' appeal as one from the final judgment, which failed to award her post-judgment interest on the punitive damages award. *See Forman v. Eagle Thrifty Drugs & Markets*, 89 Nev. 533, 536, 516 P.2d 1234, 1236 (1973).

Additionally, Bartgis purports to appeal from the district court's order denying her post-judgment motions for sanctions and

(continued...)

CONCLUSION

We conclude that substantial evidence supports the jury's finding of bad faith and fraud against both Allianz and Wohlers. Further, we conclude that the compensatory damage award was not excessive, and, due to the existence of a joint venture between Wohlers and Allianz, that the district court did not err in finding that Wohlers was contractually obligated on Bartgis' insurance policy.

Likewise, we conclude that substantial evidence supports the jury's finding that Allianz engaged in unfair claims practices proscribed by NRS 686A.310. However, because Wohlers is not an insurer within the meaning of the applicable statutory definition, we reverse Wohlers's NRS 686A.310 liability. Lastly, we conclude that the punitive damages assessed against both Allianz and Wohlers are excessive as a matter of law, and that the district court erred in denying Bartgis post-judgment interest on the punitive damage award.

Based on the foregoing, the punitive damage assessment against Allianz is reduced from $7,500,000.00 to

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[10/](...continued)
discovery. We do not discern, however, how Bartgis was aggrieved with respect to these issues. Although Bartgis brought her post-judgment motion for sanctions and further discovery in the context of Wohlers and Allianz's motion for a new trial, the district court denied the motion for a new trial. Therefore, it does not appear that Bartgis was aggrieved with respect to these post-judgment issues. *See* NRAP 3A(a) (only aggrieved party may appeal from an appealable order or judgment); *City of Reno v. Harris*, 111 Nev. 672, 676, 895 P.2d 663, 666 (1995) (noting that an aggrieved party is one whose property right or personal right is substantially or adversely affected by the order or judgment from which the appeal is taken). Consequently, we conclude that we lack jurisdiction to address these issues.

$3,750,000.00, and the punitive damage assessment against Wohlers is reduced from $500,000.00 to $150,000.00. Accordingly, we remand this case solely for a determination of post-judgment interest on the modified punitive damage award as of the date the judgment was entered.

/s/ Springer, C.J.
Springer

/s/ Shearing, J.
Shearing

/s/ Rose, J.
Rose

/s/ Young, J.
Young

/s/ Maupin, J.
Maupin

APPENDIX B

IN THE SECOND JUDICIAL DISTRICT COURT OF NEVADA IN AND FOR THE COUNTY OF WASHOE

DEBRA BARTGIS, PLAINTIFF,

VS.

NORTH AMERICAN LIFE & CASUALTY COMPANY, ET AL.,

CASE NO. CV93-04250

DEPT. NO. 8

DECEMBER 12, 1995

ORDER

Subsequent to the jury trial in this action, and the Judgment on Jury Verdict entered May 19, 1995, the parties to this action have filed various post-trial motions. They have been submitted to this Court for decision, and each one is addressed in the order in which it was filed.

1. POST-JUDGMENT INTEREST ON PUNITIVE DAMAGES

On May 23, 1995, Plaintiff filed a petition to amend the judgment, asking for post-judgment interest on the punitive damage award. Although conceding that *Ainsworth v. Combined Ins. Co.*, 104 Nev. 587, 763 P.2d 673 (1988), *cert. denied*, 493 U.S. 958 (1989), does not entitle prevailing plaintiffs to such an award, Plaintiff argues (1) that a majority of other jurisdictions do (no cases were cited), and (2) awarding interest on punitive damage awards

would prevent defendants from filing frivolous and baseless appeals to delay payment of such awards.

Defendants' opposition cites *Ainsworth I* (above) and *Ainsworth v. Combined Ins. Co.*, 105 Nev. 237, 774 P.2d 1003 (1989) (*Ainsworth II*). The latter case was before the Nevada Supreme Court on a motion for rehearing, but both cases stand for the proposition that the purposes and policies underlying awards of punitive damages would not be furthered by an award of any interest. The *Ainsworth II* court also held that NRCP 11 and NRAP 38 adequately address problems relating to frivolous filings.

Plaintiff's reply attempts to distinguish *Ainsworth II* by arguing that the Supreme Court did not fully analyze the merits of the issue, and gave it short shrift. She also argues that NRS 17.130(2)[1] "recognizes a dichotomy between a plaintiff's right to interest which accrues after judgment and before judgment by making a distinction between past and future damages."

Plaintiff's position is untenable, and the motion is DENIED. The Nevada Supreme Court has squarely addressed this issue, and has rejected the argument that awards of post-judgment interest on judgments assessing punitive damages would promote substantial justice and deter frivolous appeals.

Ramada Inns, Inc. v. Sharp, 101 Nev. 824, 826, 711 P.2d 1 (1985), held that *pre*judgment interest on compen-

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[1] NRS 17.130(2) provides: "When no rate of interest is provided by contract or otherwise by law, or specified in the judgment, the judgment draws interest from the time of service of the summons and complaint until satisfied, except for any amount representing future damages, which draws interest only from the time of entry of the judgment until satisfied, at a rate equal to the prime rate . . . plus 2% . . .".

satory damages is not a penalty; it should be viewed as compensation to the plaintiff for the time period defendant had use of that money, i.e., from the time the cause of action accrues until the time of judgment.

With respect to punitive damages, the *Ramada Inns* court also noted:

> [T]he amount of punitive damages to be awarded cannot be ascertained until the trier of fact has heard all the evidence. Because the amount of punitive damages to be awarded is not known until the judgment is rendered, we hold that prejudgment interest may not be granted by a trial court on punitive damage awards.

101 Nev. at 826.

Then in *Ainsworth II* the court cited *Ramada Inns* and applied the reasoning from that case to the issue of post-judgment interest on punitive damages:

> [I]n *Ramada Inns*, we observed that the purposes underlying compensatory and punitive damages distinguish a plaintiff's entitlement to prejudgment interest on such awards. While compensatory damages are intended to *compensate* a wronged party, punitive damages are solely designed to punish and deter fraudulent, malicious or oppressive conduct. *See also* NRS 42.010. A plaintiff is therefore never entitled to punitive damages as a matter of right. Thus, in rejecting Ainsworth's arguments on appeal respecting his entitlement to interest, we applied our prior reasoning and holding in *Ramada Inns* to the question of *post-judgment* interest, and concluded that the purposes and policies underlying awards of punitive damages would not be furthered by an award of *any* interest in this case. The authorities Ainsworth has cited for the first time on rehearing do not alter our conclusion in this regard.

105 Nev. at 244 (emphasis in original).

Plaintiff's attempt to label punitive damages as "future" damages does not change anything. Given the clarity of the case law on this issue, the Court surmises it was Plaintiff's goal to have this issue decided by this Court in the event Defendants appealed (which would have divested this Court of jurisdiction) rather than filing post-trial motions.[2]

2. MOTION TO RETAX AND SETTLE COSTS

On May 23, 1995, Plaintiff submitted a "Verified" Memorandum of Costs pursuant to NRS 18.005 and 18.110 within the required 5 days after entry of judgment, but it was not verified.[3] There are 12 categories of costs for which Plaintiff requests $36,290.18:

1.	Clerk's fees	$2,308.97
2.	Reporters' fees for depositions	
	Bonanza Reporting	$815.30
	Sunshine Reporting	$119.85
	O'hare Reporting	$2,785.10
	Oliver Reporting	$513.40
	Seattle Reporters	$721.20

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[2] Defendants' timely post-trial motions pursuant to NRCP 50 (JNOV) and NRCP 59 (new trial/remittitur) have tolled the 30 days within which to appeal; see NRAP 4(a)(2). The combined motions were made within the required 10 days after written notice of entry of judgment on the jury verdict, plus the three days for mailing under NRCP 6(e). Nevada Civil Practice Manual, 3d Edition §§ 2503, 2506.

[3] Plaintiff's attorneys subsequently filed a verification which contains the standard language found in Second Judicial Court forms, on June 1, 1995, and a Verified Supplemental Memorandum of Costs on June 9, 1995, which adds $654.95 for The Copy Store charges.

	Sierra NV Reporters	$748.37
3.	Witness fees (subpoena)	$100.00
4.	Process server fees	$50.00
5.	Official Reporter fees	$411.25
6.	Research and Expert fees	
	Leverty & Assoc.	$14,063.50
	Westlaw	$113.54
	James Wadhams	$5,000.00
7.	Litigation Services	
	Gressman & Assoc.	$110.58
8.	Photocopies	$2,329.57
	Supplemental submission	$654.95
9.	Long distance	blank
10.	Postage	blank
11.	Travel & Lodging (discovery)	
	Airfare-Chicago and Minneapolis (8/94)	$1,271.00
	Hotel - Chicago	$222.51
	Food - Chicago	$73.76
	Room - Minneapolis	$438.84
	Airfare - Chicago (4/95)	$1,282.00
	Hotel - Chicago	$623.41
	Food - Chicago	$310.72
	Airfare - Seattle	$186.00
	Food - Seattle	$30.68
12.	Other necessary expenses	

Medical records	$452.26
NV Ins. Commission	$15.00
Reno-Carson Messenger	$370.00
Gasoline	$93.00
Food	$19.42
Parking fee	$5.00

Defendants then moved to retax and settle costs on May 30, 1995, with the following specific complaints:

1. Absent the verification, Plaintiff has not complied with the statute, so costs should be denied. Without underlying invoices, the Court would be unable to determine whether these charges are correct and necessary, so costs should be denied.

2. NRS 18.005(5) allows $1,500 per expert witness, and absent justifying circumstances for $19,000+ in such fees, plaintiff should be limited to $1,500 for one witness. Defendants also claim that Westlaw research is not authorized.[4]

3. "Litigation services" are not authorized by statute, and should be denied.

4. the charges for photocopies appear excessive.

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[4] For future reference, NRS 18.005 was amended during the last legislative session. Subsection 16 now includes "reasonable and necessary expenses for computerized services for legal research." Section 1 of Chapter 709, Statutes of Nevada 1995, at page 2716. It was approved July 7, 1995, and therefore does not apply to this case. There is a general presumption in favor of prospective application of statutes unless the legislature clearly manifests its intent to do otherwise. *Convention Properties v. Washoe Co. Assessor*, 106 Nev. 400, 402, 793 P.2d 1332 (1990).

5. the travel and lodging expenses for discovery appear unreasonable and excessive without the benefit of invoices or further itemization.

6. "Gasoline," "food," and "parking fee" are outside the scope of recoverable costs; the Reno-Carson Messenger fee is unreasonable and lacks a statutory basis.

Defendant argues that since Plaintiff has the burden of showing the costs were correct and necessary, and failed to do so on the above, those specific items should be disallowed.

Plaintiff filed her opposition on June 9, 1995, countering that Defendants' arguments are hypertechnical. Plaintiff argues that applicable statutes and case law do not require invoices and bills to substantiate costs; that Mr. Leverty's expert fees of $14,063.50 are justified because he assisted Plaintiff from the inception of the case; that Defendants do not specify why the travel and lodging expenses appear excessive; and that the gasoline, lunch and messenger service fees fall within the scope of the catch-all provisions of NRS 18.005(16). Plaintiff withdrew her request for Westlaw charges, and provided invoices for the photocopying charges and "litigation charges" from Gressman & Associates (those appear to be for copying and binding work).

Since the statutory time limit for filing a memorandum of costs is not jurisdictional, *Eberle v. State ex rel. Redfield Trust*, 108 Nev. 587, 836 P.2d 67 (1992), the late filing of the verification itself does not preclude a ruling on the motion. With the possible exceptions of some expert witness fees and "litigation charges" discussed below, Plaintiff is entitled to her costs.

As prevailing party, costs must be allowed to Plaintiff under NRS 18.020(3). *Flamingo Realty v. Midwest Development, Inc.*, 110 Nev. 984, 992, 879 P.2d 69

(1994), citing *Randono v. Turk*, 86 Nev. 123, 133, 466 P.2d 218 (1970) (statutory award of costs is mandatory). The determination of which expenses are allowable as costs is within the sound discretion of the trial court. *Bergman v. Boyce*, 109 Nev. 670, 679, 856 P.2d 560 (1993). This case was pending for approximately 2 years prior to trial. When viewed in that light, the charges for airfare, lodging, and photocopies do not seem excessive, and all three charges fall within statutory categories.

Under *Bergmann*, 109 Nev. at 681-682, trial courts may award courier expenses to the extent the court determines the expenses incurred where reasonable and necessary. The $370 does not seem excessive since if Plaintiff's counsel had a runner in their employ, it is reasonable to assume he or she would have earned $370 worth of wages related to this case over the course of two years.

The *Bergmann* court disallowed charges for document preparation, witness preparation, and jury analysis. The "litigation services" seem to fall within a like category. Thus, the $110.58 is disallowed.

A disputed point that appears to have some merit is the one concerning expert witness fees. NRS 18.005(5) includes expert witness fees as "costs" and provides for the following:

> Reasonable fees of not more than five expert witnesses in an amount of not more than $1,500 for each witness, unless the court allows a larger fee after determining that the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee.

The amount of expert witness fees in each case is a matter within the sound discretion of the trial judge, and will not be disturbed unless found to be manifestly

erroneous.[5] *Arnold v. Mt. Wheeler Power Co.*, 101 Nev. 612, 615, 707 P.2d 1137 (1985). Defendants argue Plaintiff should be limited to the statutory amount of $1,500 for one expert, since both of her experts testified on similar issues.

Plaintiff argues as follows:

> The expert witness fees sought by each Plaintiff's experts is clearly warranted because of the complexity of this case, the significance of each experts (sic) testimony and the necessity of expert testimony in a case of this type. Indeed, it would be impossible for a plaintiff to obtain a qualified expert to participate in a case of this nature for $1,500, and it is submitted that Defendants' own experts each charged over $1,500 (one of Defendants' experts testified his fees was over $6,000).
>
> Mr. Leverty's fee of $14,063.50 is completely justified. Mr. Leverty and his firm participated in this case and assisted Plaintiff *from the inception* of the litigation, and advised Plaintiff's counsel both in the discovery and trial phases of this case. In addition, pursuant to stipulation with defense counsel, the billing submitted by Mr. Leverty for his deposition testimony, and all preparation time pertaining thereto, was paid for by Plaintiff. (similar arguments for Mr. Wadhams' $5,000 fee) (emphasis in original).

---

[5] In *Arnold*, the trial court heard argument on the reasonableness and necessity of the expert testimony, which is one way to determine whether the costs should be allowed. In *Schouweiler v. Yancey Co.*, 101 Nev. 827, 831, 712 P.2d 786 (1985), the Supreme Court was unable to ascertain the necessity of the experts' testimony, since the trial transcript wasn't part of the record on appeal (but assumed the trial court was correct in denying the fees).

The record contains a portion of Mr. Leverty's testimony, but this Court also has independent recollection enough to ascertain whether the circumstances warrant departure from the statutory allowance of $1,500 per expert. This Court believes this case does warrant such a departure.

Allowable Costs — As noted above, the $110.58 has been disallowed from the 12 categories requested by Plaintiff (*see* page 4-5, *supra*). The Court believes Plaintiff is entitled to $19,063.50 for her expert witness fees. Accordingly, allowable costs total $36,015.06.

3. MOTION FOR JNOV, NEW TRIAL, OR TO ALTER/AMEND JUDGMENT

Defendants' NRCP 50(b) motion for judgment notwithstanding the verdict ("jnov") is based on the ground that the verdict of the jury is contrary to the evidence and the law. The contemporaneous NRCP 59(a) motion for new trial and NRCP 59(e) motion to alter or amend the judgment are based on the following grounds:

1. Irregularity in the proceedings and orders by the Court that prevented a fair trial;

2. manifest disregard by the jury of the instructions of the Court;

3. excessive damages appearing to have been given under the influence of passion or prejudice;

4. error in law occurring at the trial and objected to by the defendants; and

5. such a total lack of evidence, and insufficient evidentiary basis, to support the verdict that there has been a manifest injustice to defendants and plain error.

New Trial Motion — The decision to grant or deny a motion for a new trial rests with the sound discretion of the trial court. *Passarelli v. J-Mar Development, Inc.*, 102 Nev. 283, 720 P.2d 1221 (1986). Defendants' cite an Idaho case for the proposition that the court is free to weigh the evidence or pass on the credibility of witnesses, making its own independent findings of fact and comparing them with the jury's findings. That is also the standard in the federal courts.

However, as noted in the Nevada Practice Manual, 3d Edition §2505, that changed in Nevada in the case of *City of Reno v. Van Ermen*, 79 Nev. 369, 381-83, 385 P.2d 345 (1963). As a result of the concurring opinion, the ground of "insufficiency of the evidence to sustain a verdict" was deleted as a ground for a new trial.

The Nevada Supreme Court has stated that in actions for damages in which the law has provided no legal rule of measurement, it is the jury's responsibility to determine the amount to be allowed. *Hazelwood v. Harrah's* 109 Nev. 1005, 1009-1010, 862 P.2d 1189 (1993), citing *Stackiewicz v. Nissan Motor Corp.*, 100 Nev. 443, 686 P.2d 925 (1984). A court is not justified in granting a new trial on the grounds of excessive damages unless the verdict is "so flagrantly improper as to indicate passion, prejudice or corruption of the jury." *Stackiewicz* at 454. The court may not invade the province of the jury by arbitrarily substituting what the court feels is a more suitable sum. *Hazelwood* at 1010. The mere fact that a verdict is large is not itself indicative of passion and prejudice. *Id.*

The Court is mindful of the large verdict in this case. However, Defendants present no convincing argument or evidence that the jury overstepped its bounds.

Defendants maintain there was no breach of contract and no agency relationship; that it was improper for the

jury to interpret the insurance policy; and that there was insufficient evidence to support the claims of bad faith, unfair claims practices, or fraud. A recent review of the jury instructions convinces this Court that the jury was properly instructed on every claim.

In addition to reviewing the jury instructions given in this case, the Court has done some independent research, which will be set forth below. The Court also notes Defendants' arguments listed in the preceding paragraph were already decided when summary judgment was denied. This Court is not convinced that reversible error occurred. Accordingly, Defendants' motion for new trial is DENIED.

JNOV Motion — When considering a motion for jnov, the court must determine whether there is any substantial evidence upon which the jury could properly base the verdict. *Ainsworth v. Combined Ins. Co.*, 105 Nev. 237, 246, 774 P.2d 1003 (1989). In passing on jnov, the trial court must view the evidence in the light most favorable to the party against whom the motion is being made. *Hazelwood v. Harrah's*, 109 Nev. 1005, 1011, 862 P.2d 1189 (1993). The district court may grant the motion only if the evidence was such that a reasonable person would have necessarily reached a different conclusion. *Id.* at 1011-1012.

In *Dudley v. Prima*, 84 Nev. 549, 551, 445 P.2d 31 (1968), the court held that the power to grant jnov motions should be cautiously exercised:

> In determining whether to render a [jnov], the court is not justified in trespassing on the province of the jury to be the judge of all questions of fact in the case, and the party favored by the verdict is entitled to have the testimony read in the light most advantageous to him, and to be given the benefit of every inference of fact fairly deducible therefrom. Accordingly, an application

> for such judgment will be refused where there is evidence tending to support the verdict, or where there is a conflict of evidence, so that the jury could properly decide, either way.

Here, there was evidence to support the verdict, and plenty of conflicting evidence. A reasonable juror could have decided either way, and this Court does not lightly invade the province of the jury. Accordingly, Defendants' motion for jnov is DENIED.

Remittitur — The standard of review of an order granting a motion for new trial unless the plaintiff accepts a remittitur of the verdict is set forth in *Harris v. Zee*, 87 Nev. 309, 311-312, 486 P.2d 490 (1971):

> When the trial judge orders a remittitur damnum and we are asked to review his action, the test is whether he abused his discretionary power. (citation omitted). This is an elusive standard. We must accord deference to the point of view of the trial judge since he had the opportunity to weigh evidence and evaluate the credibility of witnesses — an opportunity foreclosed to this court. To this extent the appeal is weighted in favor of the order entered, and when there is a material conflict of evidence as to the extent of damage, a challenge to the trial court's exercise of discretion is substantially repelled. *However, this is not so when the evidence regarding damage is not in conflict. The order to remit immediately becomes suspect unless the amount awarded by the jury standing alone, is so excessive as to suggest the intrusion of passion and prejudice on its deliberations.* (emphasis in original, and cited in *Stackiewicz* at 454).

The following is the standard for evaluating excessiveness of punitive damages in Nevada:

> Punitive damages are legally excessive when the amount of damages awarded is clearly disproportionate to the degree of blameworthiness and harmfulness inherent in the oppressive, fraudulent or malicious misconduct of the tortfeasor under the circumstances of a given case. If the awarding jury or judge assesses more in punitive damages than is reasonably necessary and fairly deserved in order to punish the offender and deter others from similar conduct, then the award must be set aside as excessive.
>
> . . .
>
> In arriving at the ultimate judgment of where excessiveness begins, courts can legitimately take into account any circumstances which relate to the limits of punishment and deterrence that can be properly imposed in a given case. Relevant circumstances include such matters as the financial position of the defendant, culpability and blameworthiness of the tortfeasor, vulnerability and injury suffered by the offended party, the extent to which the punished conduct offends the public's sense of justice and propriety, and the means which are judged necessary to deter future misconduct of this kind.
>
> As can be readily understood, these factors are largely common sense considerations which relate in everyday terms to the judgment of what goes beyond fair and proportionate punishment and reasonable deterrence under the circumstances. The ultimate question remains the same: Whether the fact finder has clearly exceeded the reasonable bounds of punishment due and justifiable deterrence as related to acts complained of.

Ace Truck v. Kahn, 103 Nev. 503, 509-510, 746 P.2d 132 (1987) (footnotes omitted).

Based on this Court's observations during trial, and a careful review of the record, the Court believes the jury reached its verdict absent passion or prejudice. The award reflects the jury's view of the reprehensibility of Defendants' conduct, and the amount they felt was necessary to deter similar future conduct. As the jury was properly instructed, the motion for remittitur is DENIED.

Court Commentary — The memoranda of law by both sides in these motions is very long on "points" and sometimes scant on Nevada "authorities." A sample of the Court's independent research, along with some commentary, is set out below. This is included here because it is much too long for a footnote, and it gives counsel an idea of the authority this Court relied upon in considering the instant motions.

Agency — As a general rule, the existence or non-existence of any agency is a question of fact for the jury. *No. Nevada Mobile Home Brokers v. Penrod*, 96 Nev. 394, 397, 610 P.2d 724 (1980). *The case goes on to say that the judge may take the question away from the jury if a fact is clearly proved and not materially disputed. Here, Defendants dispute agency to this day, and the question was properly given the jury.* The case also holds that the existence of an agency relationship is not essential to a cause of action for fraud. 96 Nev. at 398.

Interpretation of the Insurance policy — When an ambiguity exists in an insurance policy, the court should consider not merely the language, but also the intent of the parties, the subject matter of the policy, the circumstances surrounding its issuance, and the policy should be construed to effectuate the reasonable expectations of the insured. *Nat'l Union Fire Ins. v. Caesars Palace*, 106 Nev. 330, 332, 792 P.2d 1129 (1990); accord *Agric. Aviation Engr. Co. v. Clark Co. Bd. of Comm'rs*, 106 Nev. 396, 397-398, 794 P.2d 710 (1990) (to determine the parties' intentions, the credibility

of their statements must be decided, which is an issue for the trier of fact).

Good Faith and Fair Dealing — It is well established in Nevada that every contract imposes upon the contracting parties the duty of good faith and fair dealing . . . Moreover, it is recognized that a wrongful act which is committed during the course of a contractual relationship may give rise to both tort and contractual remedies. *Hilton Hotels Corp. v. Butch Lewis Productions, Inc.*, 109 Nev. 1043, 862 P.2d 1207 (1993). *The jury was properly instructed on the limits on contract damages; the tort claims of bad faith and fraud were separately instructed.*

Unfair Claims Practices — The jury was properly instructed on the statutory language.

Fraud — Fraud must be proven by clear and convincing evidence, as to EACH element: (1) a false representation made by the defendant; (2) Defendant's knowledge or belief that the representation is false (or insufficient basis for making the representation); (3) Defendant's intention to induce the plaintiff to act or to refrain from acting in reliance upon the misrepresentation; (4) plaintiff's justifiable reliance upon the misrepresentation; and (5) damage to the plaintiff resulting from such reliance. *Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 111, 825 P.2d 588 (1992), citing *Lubbe v. Barba*, 91 Nev. 596, 540 P.2d 115 (1975).

4. MOTION FOR POST-TRIAL DISCOVERY & SANCTIONS

Post-Trial Discovery — The first part of this motion is ostensibly made pursuant to NRCP 27(b), requesting post-trial discovery. It also requests sanctions for Defendants' alleged fraud and false representations pertaining to disclosure of the names of other insureds affected by the ancillary charges provision of the policy.

The reply consists of a very lengthy discourse, indignant in tone, attempting to convince the Court that Defendants are pure evil. One of the attachments is a copy of a *Wall Street Journal* article, reporting that the California insurance regulators are after Allianz for some $5 million in fines for allegedly deceptive sales practices. The reply's authorities consist of case law from other jurisdictions interpreting Rule 60(b)(3) (motion to set aside judgment or order based on fraud).

Defendants' counsel, in opposition to this motion, represents that they will preserve the evidence generated by Allianz and Wohlers concerning other insureds. They also charge that Plaintiff's counsel is after this information so they can get fresh clients to sue Defendants. Defendants also point out that Plaintiff's counsel failed to follow Discovery Commissioner Ayers' suggestion to return to his office if the depositions did not unearth the desired information.

Based on a close reading of the rule and a recent case, and the representations of Defendants' counsel that the information will be preserved, this motion is DENIED. In *Sunrise Hospital v. Eighth Judicial District Court*, 110 Nev. 52, 55-56, 866 P.2d 1143 (1994), the court held:

> NRCP 27 is available in special circumstances to preserve testimony which could otherwise be lost due to some occurrence other than the mere passage of time. . . . An order permitting perpetuation of testimony is to be granted only in extraordinary circumstances. Further, an order permitting the perpetuation of testimony should be limited to that evidence which will likely be lost or destroyed without the order. . . . The analysis provided above is applicable to any petition for perpetuation of testimony.

The *Sunrise Hospital* case involved parents of an infant who had been severely injured after surgery. They wanted to preserve the authenticity of hospital records pursuant to NRCP 27(a) prior to bringing the case before the required medical-legal screening panel. The court did not think those circumstances were extraordinary enough.

Likewise, this case does not warrant invocation of NRCP 27(b). Plaintiff's counsel seems to think that the more insureds they have to testify, the more the damages Plaintiff will be awarded.[6] This is not a lottery. The trial is over; Plaintiff proved her case and prevailed. Plaintiff argues that in the unlikely event the case is retried, they need the evidence. Defendants have already said the information will be preserved. It seems to this Court that a little imagination would have uncovered this information separately (a newsletter or other form of communication to court reporters in this area).

In addition, Plaintiff's counsel argues that this Court should not allow a party to make false representations and thereby let those who rely on it be foreclosed from a remedy. Plaintiff was afforded a remedy. This was not a class action suit, so that argument makes no sense.

Sanctions — Plaintiff's counsel had ample opportunity to act on its suspicions that Defendants were not

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[6] Plaintiff presented her testimony and that of Eric Nelson. The record now contains an affidavit from Viola Steiner, who had an operation and an experience similar to Plaintiff's. However, Plaintiff's counsel has apparently determined that more witnesses are necessary. If numerous witnesses had been available, valid objections would be raised under NRS 48.035(2): Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time, *or needless presentation of cumulative evidence*. (emphasis added).

forthcoming during discovery. They could have moved for sanctions under the discovery rules, filed a motion to compel, or had another conference with Discovery Commissioner Ayers. The Court has a dim view of this request, and it is DENIED.

5. REQUEST FOR ORAL ARGUMENT

Oral argument in a motion is a privilege, not a right. NRCP 78; Nevada Civil Practice Manual, 3d Edition §1110. WDCR 12(5) permits oral argument when ordered by the Court.

Plaintiff's request for oral argument is DENIED.

DATED this 12 day of December, 1995.

/s/ Steven R. Kosach
District Judge

APPENDIX C

IN THE SUPREME COURT OF THE
STATE OF NEVADA

ALBERT H. WOHLERS AND CO. AND NORTH AMERICAN
LIFE AND CASUALTY COMPANY,
APPELLANTS/CROSS-RESPONDENTS,

vs.

DEBRA BARTGIS, RESPONDENT/CROSS-APPELLANT.

No. 28142

MARCH 17, 1999

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED

/s/ Rose, C.J.
Rose

/s/ Young, J.
Young

/s/ Maupin, J.
Maupin

/s/ Shearing, J.
Shearing

cc: Hon. Steven R. Kosach, District Judge
Lemons, Grundy and Eisenberg
Beckley, Singleton, Jemison and List
Mayer, Brown and Platt
Calvin R.X. Dunlap
Georgeson, Thompson and Angaran
Bradley, Drendel and Jeanney
Bowman and Robinson
Washoe County Clerk

Supreme Court, U.S.
FILED
MAY 25 1999
CLERK

(2)

No. 98-1781

IN THE
Supreme Court of the United States

ALLIANZ LIFE INSURANCE COMPANY
OF NORTH AMERICA,
Petitioner,

v.

DEBRA BARTGIS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

RESPONDENT'S BRIEF IN OPPOSITION

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May 25, 1999

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

27PP

QUESTION PRESENTED

Whether the Nevada Supreme Court reasonably declined to apply federal due process standards to a $3.75 million punitive damages award arising out of insurance fraud and bad faith where no federal question was raised until a reply memorandum filed in support of a motion for judgment NOV and where the state law standards were manifestly more protective of the insurance company's interests than the federal constitutional requirements stated in this Court's decisions, particularly *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443 (1993).

RULE 29.6 STATEMENT

Respondent is an individual and thus has no disclosure to make pursuant to Rule 29.6 of the Rules of this Court.

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Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

RESPONDENT'S BRIEF IN OPPOSITION

It is impossible to fathom how petitioner can construct an argument that the punitive award in this case violates the Due Process Clause of the Fourteenth Amendment without even citing, much less attempting to distinguish, this Court's decision in *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443 (1993). Given the jury's findings, which are uncontested now, that petitioner engaged in "bad faith" and "fraudulent" efforts to "conceal" a bizarre reimbursement restriction in its insurance policy, this case presents facts that are, if anything, appreciably worse than those in *TXO*. See *TXO*, 509 U.S. at 472 (Scalia, J., concurring). This is not conduct that is lawful in any state, let alone in most states, which was what caused the Court in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 585-86 (1996), to set aside the punitive award in that case. In stark contrast, this case in-

volves knowing and intentional wrongdoing that caused significant emotional and even physical harm to the plaintiff. These are the classic justifications for a substantial punitive damage award.

No doubt recognizing the manifest weakness of its due process argument, petitioner seizes upon a strikingly ambiguous footnote in the Nevada Supreme Court's opinion as the foundation for an argument that Nevada is engaged in "civil disobedience" because it failed to pay heed to this Court's pronouncement in *BMW*. That is silly. The best interpretation of the footnote is that it reflects the Nevada Supreme Court's determination that petitioner had not adequately preserved a federal constitutional challenge because it was not raised in a timely fashion in the trial court. Moreover, the Nevada Supreme Court's reliance on state law, rather than federal constitutional law, saved petitioner $3.75 million because the punitive damage award of the jury, which was reduced by that amount by the Nevada Supreme Court, was fully consistent with federal constitutional standards embodied in *TXO* and *BMW*. In sum, there is no significant legal issue presented by the decision below, and accordingly, the petition for certiorari should be denied.

STATEMENT

This case arises out of gross insurance fraud and bad faith that caused the individual plaintiff significant personal injuries that warranted a $283,757.75 compensatory award. That compensatory award is uncontested in this Court. Moreover, if petitioner's scheme were left unchallenged, petitioner stood to net significant financial gain. In addition, petitioner's description of its conduct that caused respondent's damage does not adequately convey the appalling nature of its actions. Properly understood, there is no serious constitutional issue presented in this case.

1. Respondent is a 46-year-old court reporter who owns her own freelance court reporter partnership in Reno, Nevada. Because she is self-employed, respondent obtained her own health insurance benefits. As a member of the National Shorthand Reporters Association ("NSRA"),[1] she purchased a policy through the Association in the early 1980s and maintained it continuously at all times relevant to this case.

The broker for this policy was Albert H. Wohlers & Co. ("Wohlers"), which was a co-defendant in the state court proceedings and is a nominal respondent in this Court. According to the petition, Wohlers now intends to pay its portion of the judgment and will not seek further review by this Court. Pet. 9 n.5. In 1990, the predecessor to petitioner Allianz Life Insurance Company of North America became the underwriter for the NSRA's health insurance policy. Pet. App. 4a.

The courts below found that Wohlers and petitioner fraudulently induced the court reporters to purchase group health insurance to replace the then-existing policy, which was underwritten by a different company. They affirmatively and falsely represented to the insureds that the replacement policy provided "comparable benefits" to those offered in the pre-existing policy. They also falsely represented that the policy constituted "comprehensive major medical insurance." In identifying a list of significant differences between the existing and the new policy, no mention was made of any significant restrictions on hospital coverage. Based on these representations and re-

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[1] The NSRA changed its name to the National Court Reporters Association sometime after respondent purchased her insurance. The lower courts and petitioner have referred to the Association by its previous acronym. Accordingly, to avoid confusion, we will do the same.

spondent's own review of the policy, she agreed to the replacement plan. *Id.* at 5a-6a.

Contrary to the representations made by petitioner and Wohlers, there was never any intention on their part to provide "comparable benefits" and this was not a "comprehensive medical plan." Instead, petitioner severely limited the hospitalization benefits by fraudulently inserting an obscure "anciilary charges" provision into the policy, which shielded petitioner from the most costly hospital coverage claims. Even the adjuster who handled respondent's claim described the provision as "goofy." III RT 792.

The "ancillary charges" provision, as applied, limited coverage in the event a patient remained in a hospital setting for 24 hours or more. Hospital stays of up to 24 hours were treated like ordinary medical expenses and reimbursed. But, if the patient were to stay in the room for any period beyond 24 hours, then the peculiar "ancillary charges" provision in the policy was triggered and petitioner would be responsible for paying essentially for room and board. In this case, that amounted to approximately 11 percent of the total hospital bills. Thus, for respondent's hysterectomy, the "ancillary" components of the operation included: the operating room, the recovery room, staplers and additional sutures, a cardiac monitor and basic anesthesia. *Id.* at 8a. The non-"ancillary" components of respondent's medical care were room and board. *Id.*

2. In 1991, respondent was diagnosed with precancerous cells in her reproductive organs and underwent a biopsy to have the cells removed. Petitioner paid for 80 percent of the half-day hospital stay. Later in 1990, petitioner was hospitalized again for an emergency and 50 percent of those costs were paid by petitioner pursuant

to the terms of the insurance contract dealing with emergency room visits. Pet. App. 6a.

In 1992, respondent's physician recommended a hysterectomy to relieve her of the serious discomfort she was experiencing. Because the procedure was deemed to be "elective," respondent was required to pay an additional $200 and to have the procedure pre-certified. She did this and the surgery was performed on December 29, 1992. The procedure was successful, but respondent was hospitalized for 27 hours, including check-in and check-out time. *Id.* at 7a.

Respondent submitted her hospital bills for payment, fully expecting to pay $200 extra for an elective procedure and a charge for exceeding the 24-hour, pre-certified period of hospitalization. *Id.* Instead of agreeing to pay essentially the promised 80 percent of the hospital costs, petitioner lumped the vast majority of the charges into a single item—$9328.75—styled "ancillary charges" and then paid only $930 of that amount. *Id.* at 7a.

Having been told that anaesthesia and an operating room are merely "ancillary" to a hysterectomy, respondent "became extremely upset." *Id.* at 8a. During a six-month period, respondent unsuccessfully sought reimbursement on the same terms she had been reimbursed for her earlier hospital stay, but without success. Throughout this period respondent became more distressed, causing her to "los[e] sleep and her appetite." She also "developed two bladder infections and an upper-respiratory infection, suffered dramatic weight loss, and felt 'generally terrible.'" *Id.* at 9a.

3. On July 15, 1993, respondent filed this lawsuit against Wohlers and petitioner in the Second Judicial District Court of Nevada, alleging breach of contract, fraud, bad faith and violations of the Nevada Unfair Practices

Act. Respondent sought both compensatory and punitive damages. The jury returned a verdict in respondent's favor in which it awarded $8,757.75 in contract damages, $275,000 in non-economic compensatory damages, and $500,000 and $7,500,000 in punitive damages against Wohlers and petitioner, respectfully.

Petitioner filed a post-trial motion for a judgment NOV challenging virtually every aspect of the jury's verdict. Specifically, petitioner argued that the award of punitive damages was excessive. In making this argument, however, petitioner pointedly relied upon Nevada law.[2] At no point in that argument did petitioner refer to the federal constitution, due process or any opinion of this Court dealing with punitive damages. See Resp. App. 5a ("*Under Nevada law,* punitive damages are required to be an amount suitable to punish or deter; to bear some reasonable relationship to the actual damages and to bear a relationship to the blameworthiness of the alleged wrongdoing") (emphasis added).[3]

The trial court denied the motion. Pet. App. 31a-49a. In addressing punitive damages, the trial court applied "the standard for evaluating excessiveness of punitive damages in Nevada." *Id.* at 43a (quoting at length from *Ace Truck and Equipment Rentals, Inc.* v. *Kahn*, 746 P.2d 132, 186-87 (Nev. 1987). The trial court concluded that "[t]he award reflects the jury's view of the reprehensibility

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[2] Defendants Allianz and Wohlers' Memorandum in Support of their Motions for Judgment Notwithstanding the Verdict, for a New Trial and/or to Alter or Amend the Judgment at 43-51. See Resp. App. 1a-8a.

[3] It was not until petitioner's reply memorandum that any mention is made of the Due Process Clause. Moreover, other than asserting that the award violates the standards of the Fourteenth Amendment, petitioner did very little to construct an argument separate from the Nevada law argument.

of Defendants' conduct, and the amount they felt was necessary to deter similar future conduct." *Id.* at 45a. Accordingly, the court denied the motion for remittitur. *Id.*

4. With respect to the only portions of the decision below that are relevant to the petition, the Nevada Supreme Court unanimously affirmed liability for bad faith and fraud and reduced the size of the punitive damages award. Pet. App. 1a-30a. The court found "preposterous" the argument by petitioner that its fraudulent conduct could "insulate it from bad faith liability and vice versa" (*id.* at 10a n.2), and otherwise held that there was ample evidence to prove petitioner's liability for fraud and bad faith breach of contract.

With regard to punitive damages, petitioner renewed before the state supreme court its state law arguments on excessiveness, but added a significantly expanded argument based on the Due Process Clause. Respondent argued in her brief that petitioner "waived any assertion that the award of punitive damages violates due process of law" because the issue had not been raised until a reply memorandum on post-trial motions in the trial court. Respondent's Answering Brief at 97-99.

The Nevada Supreme Court reduced the punitive award against petitioner from $7.5 million to $3.75 million. In doing so, the court noted: "We hold that the jury's assessment of punitive damages is excessive solely as a matter of state law." Pet. App. 24a n.7. The court went on: "Thus, we do not consider [petitioner's] argument, premised on *BMW* . . . that the punitive damages awarded in this case are grossly excessive pursuant to the Fourteenth Amendment of the Federal Constitution." *Id.*

The Nevada Supreme Court's analysis of excessiveness under state law bore a striking resemblance to the analysis

outlined by this Court in *BMW*. The state court considered whether the award was disproportionate to the degree of blameworthiness or harmfulness of petitioner's conduct and whether the size of the award was reasonably necessary to punish the offender and to deter others from similar conduct. *Id.* at 25a. Under these standards, the punitive award against petitioner was cut in half in large part because petitioner offered to settle by agreeing "to pay the full amount of respondent's claim" and her attorney's fees. *Id.* at 26a. Of course, that offer, which only came *after* petitioner was caught red-handed, was contingent upon respondent agreeing to release petitioner from all other claims she might have, including her non-economic damages.

REASONS FOR DENYING THE PETITION

Petitioner's basic argument is that the 3.75 million dollar punitive award should have been reviewed under the standards enunciated by this Court in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996), and that under those standards the award would be deemed excessive. That simply is wrong. Under this Court's punitive damages cases, including *TXO*, which petitioner completely ignores, the original $7 million punitive damage award would have been constitutional. In any event, this case involves no conflicts with decisions of any other state courts or federal courts of appeals, and the proper application of *BMW* and *TXO* to the specific facts of this case is not an issue that remotely warrants review by this Court.

Petitioner recognizes as much and therefore attempts to dress up this case by employing extraordinary hyperbole. It asserts that the Nevada Supreme Court's failure explicitly to address *BMW* constitutes an act of judicial civil disobedience that attacks "one of the cornerstones of our constitutional system." Pet. 1. There is a simpler and

far less pernicious explanation for the unanimous court's refusal to entertain petitioner's federal constitutional claim, *viz.*, it was not timely raised in this litigation. Moreover, given that petitioner received far more relief under state law than it was entitled to receive as a federal constitutional matter, the issue is irrelevant and certainly not worthy of certiorari.

1. Petitioner first argues (Pet. 10-12) that the failure to apply *BMW* by name to this case violates the Supremacy Clause. This is a patently silly effort to elevate a somewhat ambiguous footnote into the worst case of judicial disobedience since the desegregation era of the 1950s. The far more logical explanation for the footnote is that the Nevada Supreme Court either concluded that petitioner's tactical choice not to mention any federal constitutional issues in this litigation prior to a reply memorandum in support of a judgment NOV was simply too late or, alternatively, that the standards of the Due Process Clause offer no greater protection in this context than state law does. Either way, the matter certainly does not warrant this Court's attention.[4]

Certainly, there is nothing in the Nevada Supreme Court's unanimous decision that remotely indicates that it does not feel bound by the Due Process Clause or by this Court's pronouncements. It would be remarkable for the

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[4] Petitioner recognizes that its contrived portrayal of the Nevada Supreme Court's actions as utterly lawless is strained. Thus, petitioner attempts (Pet. 17-19) to make the problem appear acute by arguing that it is symptomatic of a broader refusal by state courts to comply with the Supremacy Clause. If those cases in fact involved deliberate refusals to entertain federal constitutional issues that were properly preserved and had independent significance, then the proper solution would be to review those decisions. The actions of the Mississippi and New Mexico Supreme Courts, which were never considered by the Nevada Supreme Court, much less relied upon by it, provide no basis for review of this case.

Court to assume such disregard of our constitutional structure when there is a readily available, less pernicious explanation available. This is not a case like *Michigan* v. *Long*, 463 U.S. 1032, 1040-41 (1983), and its progeny, where the lower court has issued a provocative constitutional ruling without addressing the source of law involved. In that situation the Court rightly assumes that the federal constitution is being invoked rather than leave the issue in doubt. Here, the Court should not assume bad faith by a state supreme court absent some clear evidence to support such a judgment. There is no such evidence; to the contrary, waiver and superfluity provide completely benign explanations for the decision below and thus undermine petitioner's effort to make a mountain out of this mole hill.[5]

2. Petitioner's final argument is that the $3.75 million punitive damage award would not withstand scrutiny under *BMW*. First, the proper application of one of this Court's decisions hardly presents an issue worthy of certiorari. Petitioner does not even argue that the decision below conflicts with any decisions of any other state courts or federal courts of appeals or that the proper under-

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[5] The suggestion (Pet. 10 n.6) that petitioner was not on "notice" that failure to raise a constitutional issue at some point in this litigation prior to its reply memorandum in support of a motion for a judgment NOV is astonishing. Nevada's rules of civil procedure, like every other state's, require timely assertion of legal issues. *See* Nev. R. Civ. P. 7(b). As this Court recognized in *Pacific Mutual Life Insurance Co.* v. *Haslip*, 499 U.S. 1, 7 (1991), the failure to provide particularized jury instructions on the due process issue is a sufficient basis not to entertain a particular claim. The failure to raise such issues in petitioner's post-trial motions flatly undercuts any suggestion that petitioner's due process arguments were not forfeited. *See Bankers Life and Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 77 (1988) ("vague appeal to constitutional principles does not preserve . . . due process claim").

standing of *BMW* is an issue of any general or recurring significance.

Second, even if the proper application of this Court's decisions in a particular context was otherwise arguably worthy of attention, petitioner's argument is completely inadequate. It does not even cite, much less discuss, this Court's much more directly relevant decision in *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443 (1993). Thus, if the Nevada Supreme Court had decided this case solely on federal constitutional grounds, not only would the $3.75 million award have been upheld, but the jury's $7 million award also would have satisfied the requirements of the Fourteenth Amendment. In any event, there certainly is no serious question that the smaller award upheld by the state supreme court below is constitutional.

Petitioner treats the proper constittutional analysis as if this issue first arose in 1996 when *BMW* was decided. But that decision did not purport to overrule *TXO* and it clearly did not do so. Thus, the proper analysis here is at a minimum more complicated than the simple three-factor approach that petitioner explicates in three pages.

At the outset petitioner must accept the fact that its conduct here was appreciably more "reprehensible" than that involved in either *BMW* or *TXO*. In *BMW* the refusal to disclose to dealers the costs of relatively trivial pre-delivery repairs was not even tortious in most states. Thus, in stark contrast to *BMW* "the record in this case discloses . . . deliberate false statements, acts of affirmative misconduct, [and] concealment of evidence of improper motive, such as were present in *Haslip* and *TXO*." 517 U.S. at 579. Petitioner's complaint (Pet. 14) that the award here is 13 times the compensatory award does not

remotely approach the multiple of 526 times the compensatory award this Court sustained in *TXO*.[6]

Petitioner places great emphasis (Pet. 13) on the Nevada Supreme Court's willingness to hold its nose and label petitioner's conduct as "not highly reprehensible." To be sure, that court gave petitioner the benefit of the doubt based on the dubious offer to pay the amount of respondent's insurance claim after defrauding respondent and inflicting serious emotional harm on her. See p. 8, *supra*. But that judicial act of leniency merely reveals the substantial benefit petitioner recovered from the application of state law standards in this case.

Petitioner also asserts (Pet. 13) that the punitive award does not "bear a reasonable relationship to the actual harm" caused by its conduct. Petitioner can only make this argument with a straight face by ignoring *TXO*. In that case the defendant engaged in "slander of title" that caused $19,000 in economic harm. Here, petitioner engaged in fraudulent and bad faith conduct that caused more than $280,000 in damages.[7] Based strictly on repre-

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[6] Recognizing the weakness in any effort to attack the proportionality of the punitive award compared to the conduct of petitioner as found by the jury and the Nevada courts, petitioner proposes to retry the case before this Court. Thus, petitioner urges (Pet. 13 n.9) that Wohlers is responsible for all of the misdeeds. Of course, even petitioner concedes that nothing was sent out to policyholders without its review (*id.*) and the jury was certainly entitled to conclude on this record that the insurance company acted maliciously in the way that it described its insurance policy and the way that it concealed its interpretation of the "ancillary charge" provision. *See* pp. 3-4, *supra*. Moreover, given Wohler's financial incentives provided by petitioner not to pay claims and to increase the number of insureds, all of Wohlers actions are directly petitioner's responsibility. II RT 440.

[7] At points in the petition, petitioner focuses (Pet. i) on the actual economic damages as opposed to the non-economic damages. This effort is obviously misguided. The notion that a health in-

hensibility and proportionality, the State easily could have imposed a much harsher penalty than $10 million on petitioner's misconduct and still have satisfied due process under *TXO*.

Finally, petitioner (Pet. 14) compares state law civil and criminal penalties for misconduct by an insurance company as a limit on the proper punitive damages award. This analysis is flawed both as a matter of federal and state law. First, this comparison has never been regarded as a dispositive basis for overriding punitive-damage awards granted under state law. See, *e.g.*, *TXO*, 509 U.S. at 456; *Haslip*, 499 U.S. at 23. But more fundamentally, petitioner conveniently identifies a series of state sanctions that it labels as "comparable." For petitioner's misconduct, it is not at all clear that the "comparable" provision is not Nev. Rev. Stat. § 205.380(1)(a), which criminalizes obtaining money by false pretenses and carries a fine of $10,000 and a prison sentence of up to six years. See *Haslip*, 499 U.S. at 23. Moreover, even the provisions cited by petitioner contain an exception for "bad faith" actions by an insurance company. See Nev. Rev. Stat. § 42.005(2)(b); Pet. App. 24a (discussing the exception).[8]

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surance company could engage in fraudulent and bad faith conduct to deny significant coverage to someone who has just experienced a serious medical treatment, such as a hysterectomy, and not expect to be required to compensate for emotional injuries is absurd. Petitioner is, if anything, fortunate that respondent's physical maladies arising out of her mistreatment by petitioner were not more serious. In any event, the $275,000 award unquestionably should be considered in determining whether the punitive award was reasonably proportionate to the harm caused by petitioner. *See BMW*, 517 U.S. at 580 (comparison to "actual harm inflicted").

[8] Remarkably, petitioner attempts to resurrect (Pet. 15 n.10) its "preposterous" argument based solely on state law that it cannot have acted in "'bad faith" if it was found to have engaged in "fraud." Pet. App. 10a n.2. There is nothing remotely inconsistent

In sum, even accepting petitioner's strikingly narrow due process analysis, it is plain that the "indicia" identified in *BMW* point squarely in favor of a punitive award much larger than the one ultimately approved by the Nevada courts in this case. Once the *BMW* blinders are removed and the case is examined in light of *TXO* and on the basis of petitioner's malicious and physically harmful conduct, then the suggestion that a serious due process question is posed here melts away. Certainly, nothing in the application of these existing precedents to the facts of this particular dispute raises any issue worthy of further review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 25, 1999

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between a finding that an insurer misrepresented the nature of its coverage in inducing a policyholder to purchase the policy and a finding that the insurer later relied in bad faith upon a bogus "ancillary charges" provision as the basis for implementing the fraud. At a minimum this state law issue cannot cast any doubt on the validity of a significant punitive award in this case. No matter what, petitioner's conduct was reprehensible and the punitive damages bear a completely reasonable relationship to the compensatory award.

APPENDIX

APPENDIX

IN THE SECOND JUDICIAL DISTRICT
FOR THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

Case No. CV 93-04250
Dept. No. 8

DEBRA BARTGIS,

Plaintiff,

vs.

NORTH AMERICAN LIFE & CASUALTY COMPANY, and ALBERT H. WOHLERS & CO.,

Defendants.

DEFENDANTS ALLIANZ AND WOHLERS' MEMORANDUM IN SUPPORT OF THEIR MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT, FOR A NEW TRIAL AND/OR TO ALTER OR AMEND THE JUDGMENT

* * * *

C. The Amount of the Award for Punitive Damages was Excessive.

A review of the circumstances Nevada courts rely on to determine whether a punitive award is excessive compared to the facts presented to the jury, demonstrate that as a matter of law this award cannot stand. The jury's verdict was a result of passion and prejudice, which is not permissible. The amount awarded for punitive damages was excessive. The standard for the review of an award

of punitive damages was established in the case of *Ace Truck & Equipment Rentals, Inc. v. Kahn*, 746 P.2d 132 (Nev. 1987). In *Ace Truck* the Nevada Supreme Court stated that a jury does not have "unbridled discretion" in setting the amount of punitive damages. *Id.* at 134. The Court recognized the need to establish standards to determine the reasonableness of punitive damages and set an upper limit. *Id.* at 13-35. The Court concluded:

> [W]e declare the following standard for evaluating excessiveness of punitive damages: Punitive damages are legally excessive when the amount of damages awarded is clearly disproportionate to the degree of blameworthiness and harmfulness inherent in the oppressive, fraudulent or malicious misconduct of the tortfeasor under the circumstances of a given case. If the awarding jury of judge assesses more in punitive damages than is reasonably necessary and fairly deserved in order to punish the offender and deter others from similar conduct, then the award must be set aside as excessive.

Id. at 136-37. Under the foregoing standard, the court is to determine "what is fair, just and reasonable" for punitive damages under the circumstances. *Id.* at 137.

The *Ace Truck* court provided guidance as to the factors to be considered when determining if an award is excessive. The Court stated:

> In arriving at the ultimate judgment of where excessive begins, courts can legitimately take into account any circumstances which relate to the limits of punishment and deterrence that can properly imposed in a given case. Relevant circumstances include such matters as the financial position of the defendant, culpability and blameworthiness of the tortfeasor,

> vulnerability and injury suffered by the offended party, the extent to which the punished conduct offends the public's sense of justice and propriety, and the means which are judged necessary to deter future misconduct of the kind.

Id. at 137. The factors adopted in *Ace Truck* have since been followed by the Nevada Supreme Court. *See Republic Ins. Co. v. Hires*, 810 P.2d 790, 792 (Nev. 1991); *United Fire Ins. Co. v. McClelland*, 780 P.2d 193, 199 (Nev. 1989).

The Court in *Kellar vs. Brown*, 108 Nev. 273 (1985) reviewed the ratio between the amount of compensatory damages and punitive damages. The Court noted that defendants in this case attempted to settle the matter at an earlier stage, and further observed that "the evidence might also be interpreted in a more charitable light" with respect to defendants' conduct. *Id.* at 274. The Court concluded that for those reasons it believed that "a punitive award of more than five times respondent's actual damages is disproportionate and unnecessary to deter appellant's from like wrongdoing in the future." *Id.* at 274.

The circumstances of this matter do not in any way justify the extraordinary award. Defendants did not act in a purposeful manner to hurt anybody. As discussed above, Allianz insured this group as an accommodation to the group that otherwise would have had no coverage whatsoever. The material and policy was drafted quickly to avoid any gap in the group's coverage. The November letter which does not reference the changes in the coverage was sent to a group that had already lost the MONY policy—defendants were not seeking to defraud anybody. There is no evidence whatsoever that Wohlers sent this letter to induce reliance for its own benefit or the benefit of Allianz.

Allianz acted under a reasonable belief that its actions were justified. Allianz knew that the application of the ancillary charge maximums was in litigation in another state. That litigation was resolved, not on a question local of law, but on simple interpretation of the policy language and a finding that it was not ambiguous. In short, Allianz is now being punished by this jury for $7.5 million for conduct which the trial court and appellate court in Texas found to be completely blameless.

Bartgis suffered minimal harm and has not adduced any evidence, except for her own, "after the fact" statements, that she relied on representations by the defendants. There is no evidence that she suffered substantially. Circumstances simply do not justify this outrageous award that is one thousand times the benefit at issue.

The award does not in any way comport with the purposes of punitive damages. The proper end to punitive damages is to punish and deter wrongful conduct. *Midwest Supply, Inc. vs. Waters*, 89 Nev. 210, 510 P.2d 876 (1973). In this matter, the policy at issue is no longer in existence. There is no future conduct to deter under this policy. Allianz, as soon as it learned of plaintiff's complaint, immediately offered to settle the dispute by payment of benefits—without regard to the maximums stated in the policy—plus attorney fees, which offer was rejected.

Furthermore, the award is excessive as it goes far beyond any reasonable punishment or detriment. The testimony was that plaintiff's premium was $91.00 for three months and $107.00 for twenty-seven months. Thus, for the entire time period of two and a half years that plaintiff was insured under the Allianz policy she paid premiums of $3,162. There was testimony that the entire group nationwide was between 600 and 700 people. As-

suming an average of 650 participants and assuming that each of them paid the same premium as plaintiff, the total gross premium for the whole group for the entire time period that the policy was in force is $2,055,300. The total punitive damage award here is roughly four times the total gross premium received—not the profit, not the net profit—but the *total* premium received throughout the existence of the group policy, which policy in fact lost money.

Under Nevada law, punitive damages are required to be an amount suitable to punish or deter; to bear some reasonable relationship to the actual damages and to bear a relationship to the blameworthiness of the alleged wrongdoing. Here Allianz stepped in to fill a void in a groups' medical insurance, lost money in so doing, but, based on this jury's apparent anger, is alone being assessed a fine of 3½ times the total gross premium.

A review of the facts of this matter evidences that defendants' conduct and plaintiff's harm pales in contrast to the facts in the seminal case of *Republic Insurance Company v. Hires*, 107 Nev. 317, 810 P.2d 790 (1991) in which the Supreme Court reduced a $22.5 million punitive damages verdict to $5 million. The facts in the instant matter are *nothing* like the facts in *Hires*. In *Hires* the defendant insurer was engaged in a deliberate and deceptive pattern of underpaying its low income insureds in a systematic matter to oppress insureds on over one million claims per year. The Supreme Court observed that this pattern would amount to a fraud of one hundred million dollars per year on its policyholders. Justice Springer depicted "how awful" the insurer really was in its dealings with its insureds as follows:

> As the trial court concluded, Republic was guilty of "conscious wrongdoing" and "malicious intent"; but

> what aggravates the wrongdoing in this case is the massive oppression engaged in by Republic and Republic's focus on defeating the legitimate claims of its low income, relatively powerless clientele. What the company was doing was to underpay its claimants on an "across the board" basis by starting "negotiations" with claimants at sixty-five percent of the true value of the claim as assessed by the company itself, and then negotiating downward from there. Shortchanging its policyholders was, according to the trial judge, "the unqualified policy of Republic, particularly with regard to lower and middle income policyholders, who are less likely to dispute Republic's position." There is evidence to support the conclusion that this oppressive policy was employed on over one million claims per year. The amount "shaved" off (to use a term coined by one of the witnesses) of Hires' legitimate claim was around $5,800.00. If, for example, only a trifling $100.00 were shaved from each of a million claims each year, we would have a staggering fraud on the company's policyholders of $100 million per year. This kind of fraud, this kind of oppression is indeed deserving of punishment.

None of this activity occurred in this matter. The Allianz policy was a one time policy that was employed to accommodate a group of insureds who would otherwise would have no insurance. The policy was put in place quickly and is no longer used today. Allianz lost money on the policy. Benefits were paid according to the terms of the policy—not "shaved".

Furthermore, the harm suffered by the *Hires* insured is in a entirely different galaxy from the minimal harm suffered by plaintiff in this matter. There was testimony in

Hires that the insured was embarrassed, his kids teased and his family was ostracized as a result of insurers' conduct. The *Hires* plaintiff was openly accused of destroying his own furniture and possessions in an insurance scam. The insured was embarrassed and slandered by this false claim. There was further testimony that the *Hires* insured suffered actual economic harm as a result of the insureds' refusal to pay for full value. In marked contrast, there is no evidence in this matter that the insured suffered any economic harm, and only minimal testimony that the insured suffered at all as a result of defendants' initial refusal to pay certain medical expenses.

If the Supreme Court deems $5 million sufficient to punish an insurer for outrageous, disgusting and evil conduct, it is impossible to justify an $8 million verdict given the facts of this case. Accordingly, this award must be drastically reduced under the standards of Nevada law.

Finally, the financial position of defendants does not justify such an award. As against the Wohlers, the jury awarded a sum exceeding 20% of Wohlers' net worth. This award will in effect cripple Wohlers. The court in *Kahn* noted that an award of punitive damages must be reversed or reduced were the "award appears to be depleting the defendants' assets in an amount and in a proportion far in excess of that which can be said reasonably necessary to punish either defendant or to deter others from similar fraudulent conduct". 103 Nev. at 511. The amount of punitive damages must not be "financially annihilating [to] the defendant".

Phillips v. Lynch, 101 Nev. 311, 704 P.2d 1083 (1985). If the Wohlers in fact were required to pay 20% of their net worth it would be a financial disaster. Given the facts of this matter this award is disproportionate to the degree of harmfulness, intent and the harm

suffered by the Bartgis. Further, it is improper to justify any award of punitive damages by references to other insureds, as Bartgis argued.

As to Allianz, the award of $7.5 million, while "only" 2.5% of this 100 year old company's net worth, is utterly out of proportion to the actual damages suffered by plaintiff as well as the permissible purposes for awarding punitive damages. Allianz insureds hundreds of thousands of people across the nation. It is improper to give significant weight to the financial status of a defendant. *Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992). If this one plaintiff is allowed to deplete such a substantial portion of the company's assets, it could be ruinous to the multitude of insureds across the country who rely on Allianz. As discussed above, there is no evidence that the actions in this matter exemplify Allianz' treatments of its insured, and therefore the award should have minimal, if any, real deterrent effect on the Company. Allianz only acted as an accommodation to this particular group of insureds who otherwise would have had no coverage. Allianz lost money on the policy, and the policy was hurriedly put in place for the benefit of the group. A multi-million dollar award is nothing more than an economic transfer of wealth that will glorify and enrich this lone plaintiff at the expense of hundreds of thosuands of insureds who can ill afford to have their premiums possibly raised or have their insurance company be financially crippled.

If there is any doubt as to why insurance costs keep going up, this judgment can leave do doubt.

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